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Foreword

THE RIGHT HONOURABLE SIR ROGER ORMROD, PC

It is a pleasure to have the opportunity of writing a foreword for an entirely new departure in legal publishing in England. The idea of an annual review by academic writers of the cases reported each year in the All England Law Reports is so obviously a good one that it is hard to understand why it never occurred to anyone until now. Perhaps, the explanation is that the gulf between practising and academic lawyers is still so wide that practitioners are scarcely aware of academics except as teachers. This Annual Review should provide at least a foot-bridge over the gulf.

Communication between the two kinds of lawyer has developed very slowly in this country. Compared with medicine and the scientific disciplines there are only a few legal journals, and those which circulate among practitioners are probably read more for professional news and the brief summaries of recent cases than anything else. The genre of the review article has been extensively developed in other disciplines to bridge the gap between academic work and practitioners but, until now, it has played only a small and sporadic part in the law. Academic lawyers tend generally to write for other academics. Their work is still rarely referred to in argument or in judgments, and then only to that of the few who have become household names. The links between practitioner and academic still are very tenuous after qualification.

Blame for this state of affairs is attributed variously to lack of interest, or exclusiveness on one side, or to impracticality or irrelevance to the needs of the profession on the other. 'Academic' is still used pejoratively in the legal profession more than anywhere else. But there are better explanations than these for the persistence of the communication gap.

Practising lawyers and academic lawyers work in different media, not as different as painters and sculptors, but more so than in disciplines such as medicine or engineering. Appreciation of this difference will help to reduce the communication gap.

Solicitors and barristers work with people who have problems. They are concerned with individual cases each of which has features which are peculiar to itself. They are not directly concerned with developments in the law except to the extent to which they may affect the advice which they give to their clients. Judges, at first instance, have a succession of separate and unconnected problems to solve, most of which will be disposed of by the findings of fact without any reference to reported cases or even a text-book. Every case makes its own appeal to his sense of 'the justice of the case'; if, as the saying goes, there is 'any law in it', the law may not always coincide with that sense. When this happens the tension can be painful. Judgments, which may surprise readers of the law reports, can sometimes be better understood by close examination of the facts and consideration of the consequences to the parties. Hard cases may make the bad law but they do expose its defects.

If the case reaches the Court of Appeal, the focal length is longer but the approach is still 'problem oriented' and the parties are too close for their particular concerns not to make themselves felt. In the House of Lords, however, the focal length increases greatly, and the individual problem is displaced by considerations of 'principle' (and sometimes of 'policy'). This accounts to some extent for the differences between the two appellate tiers.

In contrast, the academic lawyer's medium is the ever-growing mass of reported judgments and legislation. His detachment from the problems of the litigants, as individuals, is complete. He is free to concern himself with questions of principle, logical or moral, or of policy in the widest sense, or with sociological implications of various kinds. His difficulty is to make an academic discipline out of material composed entirely of artefacts of this or earlier generations of judges and legislators, and subject to change, almost literally 'at a stroke'. As a legal critic he can select his own terms of reference when he comes to appraise a judgment, but they may or may not be relevant for the practitioner. Writers of review articles addressed primarily to practitioners must, therefore, make choices which may not be easy.

Most of those who subscribe to the All England Law Reports do so to keep an eye on recent developments in the law generally and, in particular, to follow in detail decisions in those branches of law in which they practise. They want to know, succinctly and quickly, what has been decided, and whether, and if so how, it will affect the advice they give to clients. They are not so much concerned with whether a decision is 'right' (whatever that may mean) as with how it fits into the context of earlier cases. They also want this information as soon as possible. If it is to be useful to them it must be readily available and easily found, preferably in close proximity to the report of the case. Few practitioners look for articles in the journals to help them because, hitherto, they have appeared sporadically and often long after the case has been reported, and in any event the choice of subject matter has been unpredictable, depending upon the whim of editor or author.

The great advantage of this Annual Review will be that choice of subject matter will be dictated by the appearance of the report of the case in the All England Law Reports, and the articles will be published together in one bound volume which will cover one year's reports, and will be immediately accessible. In this way it will establish direct and regular contact between a considerable number of academic lawyers and a large body of practitioners. It will also go some way to meeting an important defect in the present system—the almost total absence of 'feed back' (except from a higher court) to the judges. To be successful in these respects, however, the writers of the reviews must use terms of reference which are appropriate to the needs of practitioners.

The publishers have assembled a remarkably distinguished group of academics to write the articles in this first volume of the Annual Review who, without exception, seem to have found the right approach; and they are to be congratulated on producing a series of most interesting reviews of the judgments reported in the All England Law Reports for 1982, all of which are a pleasure to read. Without being 'academic' or didactic, they will enlarge the horizon of practitioners and enable them to see these judgments in perspec-

tive. It will also be helpful to the judges, including the Law Lords, to see their judgments through eyes which have been trained in a different way. If this standard can be maintained the Annual Review will become an invaluable reference book, not only to practitioners but probably also for students, particularly those who are looking for the latest developments in the law.

In launching this new venture, the publishers have made a major advance which, it is to be hoped, will lead to other forms of direct contact between academic and professional lawyers which have been so valuable in other disciplines.

Publisher's Note

The All England Law Reports Annual Review is designed as a companion to the All England Law Reports. Each year a volume will be published containing articles reviewing the decisions of the courts reported in the All England Law Reports in the preceding year. The article on taxation also covers cases reported in Simon's Tax Cases.

The authors of the articles are leading academic lawyers and their aim is to evaluate the reported decisions and to place them in the context of their particular subject area. Not all of the cases, of course, fall neatly into one or other of the categories of conventional legal classification. The authors have tried to avoid duplication in their discussion of cases and there are a number of cross-references to be found in the articles. Some cases, however, may properly be examined in more than one article because different aspects are of importance in different contexts.

It is inevitable that the reported decisions in any one year do not cover all aspects of the law. They merely reflect those areas which were the subject of litigation. The 1982 Annual Review contains no separate article on insurance, for example, although there are two important cases on that subject. One, *Swain v Law Society*, is discussed in the articles on solicitors and trusts, the other, *Shell International Petroleum Co Ltd v Gibbs, The Salem*, is to be found in the article on shipping. It could well be that in future years there will be an insurance article. On the other hand, the 1982 All England Law Reports contained a number of interesting cases concerning prisons and the police which seemed to merit separate articles for this volume.

Some very specialised areas of the law are not reported extensively in a general series of reports such as the All England Law Reports. There is no article on intellectual property in the 1982 Annual Review because most of the cases are to be found in the specialised reports; this does not rule out the possibility of this subject appearing in another year.

Cases from the 1982 All England Law Reports and Simon's Tax Cases are printed in bold type in the Table of Cases. A bold page number indicates where discussion of the case is to be found.

This volume should be cited as All ER Rev 1982.

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Abbreviations

BYIL	British Yearbook of International Law
CLJ	Cambridge Law Journal
CLR	Commonwealth Law Reports
Conv	Conveyancer
Corn ILJ	Cornell International Law Journal
Cr App R	Criminal Appeal Reports
Cr LR	Criminal Law Review
DLR	Dominion Law Reports
EG	Estate Gazette
EHRR	European Human Rights Reports
EIPR	European Intellectual Property Review
Fam Law	Family Law
FSR	Fleet Street Reports
Harv LR	Harvard Law Review
ICLQ	International and Comparative Law Quarterly
ICR	Industrial Cases Reports
Ill LR	Illinois Law Review
JBL	Journal of Business Law
JP	Justice of the Peace Reports
JPN	Justice of the Peace Newspaper
LPA	Law of Property Act 1925
LQR	Law Quarterly Review
LRA	Land Registration Act 1925
LS Gaz	Law Society Gazette
MLR	Modern Law Review
NLJ	New Law Journal
NZLR	New Zealand Law Reports
P & CR	Property and Compensation Reports
PL	Public Law
SCR	Supreme Court Reports
SJ	Solicitors' Journal
SLT	Scots Law Times
STC	Simon's Tax Cases
Yale LJ	Yale Law Journal

Administrative Law

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Public and private law

The decision which touches the most fundamental level of English administrative law in the All England Law Reports for 1982 came almost at the very end: *O'Reilly v Mackman* [1982] 3 All ER 1124. In this decision the House of Lords laid it down that there exists a distinction between public law and private law which goes to the heart of the civil jurisdiction of English courts. It would seem that this distinction has always been present, and indeed is presupposed by the very expression 'administrative law'; but the instant case turns the spotlight on it with a directness which is new.

In one sense administrative law in England can mean all those actions at law to which an administrative authority is a party. Professor H W R Wade includes a discussion of the liability of public bodies in contract and tort when dealing with the 'judicial control of administrative powers' in his book *Administrative Law*; and the cases he considers show that issues of public law and private law respectively are interconnected in practice despite the distinction in principle. Thus the question whether the activities of a public body are ultra vires, which is clearly a matter within the ambit of public law, may affect that body's contractual liability which is clearly within the ambit of private law; and the question whether the conduct of a public body amounts to a nuisance, which is a private law matter, may affect the question whether that conduct is ultra vires. Cases to this effect are *Cory (William) & Son Ltd v City of London Corpn* [1951] 2 All ER 85, and *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193.

Nevertheless cases in contract, tort or analogous causes of action to which public bodies are a party are not altered in their private law nature by that fact. If Barchester District Council sues Mrs Proudie, or she sues the council, for breach of contract, negligence, trespass, even libel (see *Bognor Regis Urban District Council v Campion* [1972] 2 All ER 61), the private law nature of the proceedings is in principle not affected by the public character of one of the litigants.

It is this blurring of the distinction that has made it desirable to draw attention to the need to avoid confusing proceedings in public law and in private law respectively. Whether proceedings are public or private in character is one question; whether the parties are public or private in character is a quite different question. There is even the question of whether the remedies are public or private in character. Perhaps the only surprising thing is that the question has not arisen in this form at an earlier date. As the matter is examined, however, some reasons for that may appear.

The facts in *O'Reilly v Mackman* are materially as follows. The appellants were prisoners at Hull prison who were subjected to disciplinary proceedings which resulted in their forfeiting remissions of sentence. They thereupon began proceedings in the High Court, by writ and originating summons,

against the disciplinary tribunal concerned, which is the Board of Visitors of Hull Prison (whose jurisdiction is conferred by rule 51 of the Prison Rules 1964, SI 1964/338), claiming relief by declaration that the decisions of the Board of Visitors were null and void for failure to observe the rules of natural justice. The Board in its turn applied to the High Court to strike out the appellants' actions as an abuse of process of the court. Peter Pain J refused, but on appeal from his decision the Court of Appeal (Lord Denning MR, Ackner and O'Connor LJJ) upheld the application and struck out the actions. The appellants in their turn appealed to the House of Lords. On 25 November 1982 the House unanimously affirmed the decision of the Court of Appeal.

Lord Diplock's speech, with which the four other Lords of Appeal concurred, placed the decision squarely on the level of the basic distinction between private and public law. The fact that each appellant sought declaratory relief merely was not significant in this context; but what did matter, in Lord Diplock's view, was that the decision of the disciplinary board neither

> 'infringed (nor) threatened to infringe any right of the appellant derived from private law, whether a common law right or one created by statute . . . So far as private law is concerned all that each appellant had was a legitimate expectation . . .';

but an expectation is not a right. There being no infringement, actual or prospective, of any private right meant that the appellants could not sue in contract or in tort or on any analogous footing.

But the 'legitimate expectation' referred to

> 'gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the board on the ground that in one way or another the board in reaching its decision had acted outwith the powers conferred on it by the legislation under which it was acting . . .'

It does not of course follow that such a challenge would be successful. In the first place there is 'a filter in the form of a requirement that either the consent of the Attorney-General to a relator action or the leave of the Court for an application for judicial review should be obtained', as stated by Warner J in *Barrs v Bethell* [1982] 1 All ER 106. In the second place the applicant, even if he succeeds in bringing his case to court, may fail on the substantive point of establishing that the body or authority challenged have in fact 'acted outwith' their powers. In the third place, even if he establishes that point of substance the court may refuse him any remedy at all, let alone the remedy which he would prefer to see granted, because the jurisdiction to award remedies in public law is purely discretionary. Shaw LJ, speaking of prerogative orders but in a context which makes his observations applicable to judicial review and relator actions as a whole, said in the course of his judgment in *R v Herrod, ex p Leeds City District Council* [1976] 1 All ER 273 at 292, that an applicant is

> 'a suppliant who seeks to invoke those remedial measures on the ground that the High Court would wish to correct some irregularity . . . which has caused him to be aggrieved, so that justice may be done.'

Lord Denning MR in the same case (at p 278) added that 'he should act promptly and before the other party has taken any step on the faith of the decision. Else he may find that the court will refuse him a remedy'.

So in essence a public law cause of action can be identified as one in which the challenged body or authority is alleged to have acted ultra vires by a sin of commission or omission. The party mounting the challenge knows that he cannot succeed unless he can make that allegation good in the eyes of the court. He must also not be found wanting procedurally in terms of promptitude and must find favour with the court in terms of persuading it to exercise discretion in his favour. If it is in truth a public cause of action he now knows that he must not trade on the fact that two of the available remedies—injunction and declaration—are available also in private causes of action. The temptation to begin his action by writ or originating summons as if it were a private cause of action, as was done in *Barrs v Bethell* and *O'Reilly v Mackman*, must be resisted, for it will lead to failure. The reason for failure will be that the necessary 'filter' is being evaded. As Lord Diplock said in the latter case (at p 1134), 'to allow the actions to proceed would be an abuse of the process of the court. They are blatant attempts to avoid the protection for the respondents for which Order 53 provides.' Order 53 of the Rules of the Supreme Court (as revised in 1977), endorsed by s 31 of the Supreme Court Act 1981, provides that all applicants for judicial review must, as stated by Goulding J in *Heywood v Hull Prison Board of Visitors* [1980] 3 All ER 594 at 598,

> 'obtain preliminary leave ex parte from a Divisional Court of the Queen's Bench Division... If an action by writ or originating summons is used instead... that requirement of leave is circumvented.'

Lord Diplock's speech ranges widely over the field of judicial review and is of central importance to any up-to-date study of English administrative law. For instance he asserts that

> 'the appreciation of the distinction in substantive law between what is private law and what is public law has itself been a latecomer to the English legal system. It is a consequence of the development that has taken place in the last thirty years of the procedures available for judicial control of administrative action' ([1982] 3 All ER at p 1128).

The milestones that mark this progress are: first, the decision in *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 All ER 122; second, the Tribunals and Inquiries Act 1958; third, the revised RSC Ord 53 procedure of 1977. The importance of the 1952 decision ('largely as a result of the historical erudition of Lord Goddard CJ displayed in the judgment of the Divisional Court, [1951] 1 All ER 268...') is the fact that it

> 'rediscovered... that the High Court had power to quash by order of certiorari a decision of any body of persons having legal authority (not derived from contract only) to determine questions affecting the rights of subjects, not only on the ground that it had acted outwith its jurisdiction but also on the ground that it was apparent on the face of its written determination that it had made a mistake as to the applicable law.'

Certiorari is not of course the only prerogative order; but it well exemplifies the central principle of the legal answerability of public authorities for due observance of the proper limits of the powers conferred upon them. This is because the other prerogative orders of mandamus and prohibition are less common and, in effect, more specialised—the former lying to compel positively the performance of duties unlawfully omitted, and the latter lying

to prohibit expected performance of acts not lawfully permitted: both look to the future conduct of authorities challenged and so exert a legal control over prospective policy. Certiorari, however, ostensibly invalidates past decisions, in such a way as to concentrate attention on the issue of *legality* even though it is official *policy* which is being affected thereby. The prerogative orders are derived from the common law, though re-modelled by statute.

The weakness of control by certiorari was its apparent dependence upon errors of law 'on the face of the record.' The Act of 1958 (now 1971) aimed to overcome this by providing that reasons should in future be given generally by public authorities for their decisions and that prerogative orders should be available irrespective of earlier statutory provisions that official decisions should 'not be called into question in any court'.

The need to revise RSC Ord 53 in 1977 arose more subtly. 'Fortunately for the development of public law in England', according to Lord Diplock ([1982] 3 All ER at p 1129), under the 1958 Act prerogative orders did not lie against the Foreign Compensation Commission. It had so happened that actions begun by writ to claim declarations that decisions of various public bodies were a 'nullity', or at any rate invalid, 'were already coming into common use in the High Court so as to promote an alternative remedy to orders of certiorari' (*ibid*, pp 1128–9). In 'the landmark decision of this House in *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208' (*ibid*), the effectiveness of an action by writ for a declaration that the decision of a public body was a nullity was tested, it being accepted that certiorari was not available against the Foreign Compensation Commission. By three to two the House upheld the claim. This was a 'breakthrough', a

> 'recognition . . . that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie one into which it was not empowered to inquire and so had no jurisdiction to determine' (*ibid*).

Thus

> 'Lord Reid . . . liberated English public law from the fetters that the courts had theretofore imposed on themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction.'

Proceedings by writ enabled discovery to be obtained of a controversial legal finding by the respondent Commission which did not appear 'on the face of their determination'.

This 'breakthrough' on a major point of substantive law was secured at the cost of bringing to the forefront an equally important problem over procedure. Prerogative orders were never obtainable 'as of right' as damages (in principle) are, even though they are, like damages, remedies provided by the common law. It has always been necessary to make a preliminary application for leave to proceed as well as to accept the discretionary nature of the remedy, since the prerogative orders are in form, as originally in substance, sought by the Crown and not the private applicant. On this basis leave is required to use a proceeding originally devised by the Crown for its own purposes. The Crown in law protects the public interest, and the Attorney-

General is the minister to whom the task of attending to this is given. To avoid pandering to 'busybodies and cranks', in the words of Warner J in *Barrs v Bethell* (above), the High Court always insists that anyone other than the Attorney-General must show that, prima facie, there is a sound reason for bringing proceedings. This is 'locus standi', or in more modern language 'sufficient interest', over which an applicant must satisfy the court before leave to proceed is given. But leave to proceed was not a requirement of an action for a declaration or an injunction, for which a writ or originating summons is the appropriate method of starting proceedings. Actions for declarations or injunctions, however desirable for the purposes of substantive public law in the light of the *Anisminic* case, as an alternative to the procedure for the prerogative orders, evaded the requirement of obtaining leave to proceed. This inevitably raised a contentious point. Either that requirement is a proper pre-requisite to a legal challenge to the policies of public bodies or it is not. If it is, then it should apply to such proceedings begun by writ or originating summons for a declaration or an injunction. If it is not, then it should be dropped from proceedings for prerogative orders.

Related to this controversial question was another. Should an applicant in those kinds of case be allowed to bring proceedings *in his own name* at all? Proceedings for prerogative orders are brought in the Crown's name. How did the alternative procedure for declarations and injunctions begin? The answer seems to be that the Attorney-General developed the custom of applying in Chancery for injunctions. He did so because in many cases the point of substance was the alleged existence of a trust, in the public or quasi-public form of a charitable trust, and breaches of trust by acts of omission or commission are a matter for equity and not common law. It became an accepted doctrine that local authorities, and perhaps other bodies, owed a fiduciary duty to the public in general, and more particularly to local ratepayers, for the proper administration of their finances. Borough corporations were peculiarly subject to these proceedings, and so were their officers: *A-G v Lichfield Corpn* (1848) 11 Beav 120; and *A-G v De Winton* [1906] 2 Ch 106. The rules of the common law with regard to the restraining of ultra vires acts and the rules of equity with regard to the restraining of breaches of charitable trusts tended to react upon one another.

In due course private citizens began to be allowed to take advantage of these proceedings just as they were allowed to take advantage of proceedings for prerogative orders. Instead of seeking leave to proceed from the King's Bench they had to seek leave to proceed from the Attorney-General; and this, when agreed, took the form of the Attorney-General consenting to lend his name and to participate in the proceedings 'at the relation of' the applicant in question. Such an action was accordingly referred to as a 'relator' action. In *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70, Lord Wilberforce discussed this in the following words:

> 'But the Attorney-General's role has never been fictional. His position in relator actions is the same as it is in actions brought without a relator, with the sole exception that the relator is liable for costs . . . He is entitled to see and approve the statement of claim, and any amendments in the pleadings; he is entitled to be consulted on discovery; the suit cannot be compromised without his approval; if the relator dies the suit does not abate.'

It can be said that the relator must not only obtain his leave to proceed but also submit (as required) to his control.

To proceedings by the Attorney-General, with or without a relator, for an injunction were added in course of time similar proceedings for a declaration. The availability of declarations as a remedy was of course provided for in the Judicature Acts 1873–75. The Rules of the Supreme Court since 1883 have provided, currently in RSC Ord 15 and 16, that:

> 'No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.'

Lord Diplock observed ([1982] 3 All ER at p 1128) that this

> 'has been very liberally interpreted in the course of its long history . . . Nor does it draw any distinction between declarations that relate to rights and obligations under private law and those that relate to rights and obligations under public law.'

This last is not surprising because 'the appreciation of the distinction in substantive law between what is private law and what is public law has itself been a latecomer to the English legal system'. The boast of English lawyers, both practising and academic, has until recently been that there is no such fundamental distinction, and thus no separate 'administrative' jurisdiction of the kind that A V Dicey saw in France and considered to be inappropriate in this country.

This boast conveniently played down the ultra vires doctrine. Also it overlooked the fact that the common law itself did and does observe the distinction, in that it recognises private law in the form of actions for damages—derived from the 'forms of action' that Maitland so memorably described, doing so from the standpoint of the historical observer mindful of their termination by the Judicature Acts—and recognises public law in the form of the prerogative orders—which until the Administration of Justice (Miscellaneous Provisions) Act 1938 were the 'prerogative writs'. It was equity, derived from the Court of Chancery, which did not observe the distinction, making its remedies generally available in private law but allowing the Attorney-General to seek injunctions in the field of public law as well as private law. Declarations followed injunctions in this respect.

Then came *Dyson v A-G* [1911] 1 KB 410. The plaintiff sought a declaration that certain demands, made by the Commissioners of Inland Revenue, that he should submit detailed returns to them of his financial affairs or suffer penalties on default, were illegal and that he was therefore under no obligation to comply with them. The availability of declaratory relief was in issue; but this concealed the deeper issue which is now out in the open—public law or private law? In *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at p 119, Lord Fraser of Tullybelton said referring to this aspect of *Dyson's* case: 'Other taxpayers could have made the same claim but the plaintiff was merely asserting his own right, and he did not purport to be acting on behalf of the public.' Also in *Gouriet's* case came the observation of Lord Edmund-Davies (at p 111), who spoke of Dyson as acting: 'to institute what were, in effect, quia timet proceedings to protect his private rights, and this nonethe-

less because the different private rights of many others were similarly threatened.'

Dyson's private rights were no doubt his property rights in his money and other personal assets. What was he protecting them against? It is hard to see that they were threatened by an equitable wrongdoing such as a breach of trust or of confidence, or a common law wrongdoing such as a tort or breach of contract—unless perhaps intimidation is the basis of the wrongdoing. It is interesting to note that the redress is to be thought of as a quia timet declaration. This reinforces the parallelism between injunctions and declarations. Indeed much of the original justification for the latter lies in the unsuitability of injunctions as a mode of redress against the Crown in circumstances where they would nevertheless be appropriate against other wrongdoers.

Yet the realities of *Dyson's* case point to the justification for his action resting not, in truth, in private law but in public law. Ultra vires conduct by the Inland Revenue was the issue.

There can be little doubt that *Dyson's* case served as a focus for the view of English law which was being combated in *O'Reilly v Mackman*. Dyson may have been looking after his own , but he was not suing in contract or tort, or in any analogous field of private law. He was contesting an official decision by the Board of Inland Revenue purportedly made under statute. The decision was found not to have been so made. The Board had, as a matter of substantive law, been found to have acted outside the proper boundary of their powers. Dyson had, in Lord Diplock's phraseology, an 'expectation' that such behaviour ought not to occur, just as O'Reilly and his fellow prisoners had an 'expectation' that the Hull Prison Visitors ought to act within, not without, their powers. What O'Reilly was told in 1982 Dyson should have been told in 1911.

Dyson's case was complicated by the tiresome circumstance that a relator action was not open to him by the very fact that the party opposed to him was none other than the Attorney-General. If Crown servants act ultra vires it is also hard to see how, in terms of the original common law at any rate, prerogative writs could have been sought. The Crown is not an 'inferior jurisdiction'. A case entitled *R v R ex p Dyson*, or *A-G (at the relation of Dyson) v A-G*, is difficult to contemplate. A V Dicey's happy view of English law without a separate 'administrative jurisdiction' seems to have overlooked this complication.

Confusion was made worse confounded by Whitehall's growing predilection for 'Henry VIII' or 'preclusive' clauses—'preclusive' being a convenient term used by Lord Wilberforce in his speech to the House of Lords in *Anisminic v Foreign Compensation Commission*. The use of these devices raises many important issues; but the issue in point here is at first sight a pedestrian one, the nature of the limited right of legal challenge which these clauses do in fact commonly provide for. In planning and compulsory purchase statutes, and many others besides, it is laid down that a decision—normally a ministerial decision—can only be legally challenged as to 'validity' within six weeks, by a person 'aggrieved' making application to the High Court (Queen's Bench Division) to quash. This is on the footing that the decision being challenged is not within relevant statutory powers or that there has been a procedural default causing substantial prejudice to the applicant. This

is a cut-down version of judicial review. It applies the ultra vires doctrine and no other, whether as to points of principle or points of detail and whether as to substantive or procedural matters. Yet it escapes from the constraints which govern the general procedures in this field—judicial review and relator actions—ie the 'filter' or need to obtain prior leave to proceed because prerogative orders are in form brought in the name of the Crown, or the need to join the Attorney-General on a 'relator' application and so secure his consent to proceed. Instead the applicant brings the case in his own name. It is true that a decision to quash in consequence of such an application is entirely within the court's discretion, exercisable in accordance with proper principles laid down by authority, but that is a matter of substantive law. The 'filter' seems to be absent at the outset in these cases.

As a result, the courts in this century have grown accustomed to individual subjects challenging Mnisters, and perhaps other public authorities, in their own name without the Crown, or the Attorney-General, appearing in substance or in form with them. This fact, together with *Dyson v A-G*, no doubt prevented the courts from wondering whether it mattered that an individual plaintiff was suing in 'public law' as distinct from 'private law'. The type of case can be well illustrated from housing law. Thus in *Belcher v Reading Corpn* [1949] 2 All ER 969, individuals can be seen suing the local housing authority in their own name seeking a declaration and an injunction to restrain the defendants from imposing rents at a certain level. The issue of substance was quite straightforwardly whether the defendants' policy in this regard was ultra vires the Housing Act 1936. Similar cases are *Smith v Cardiff Corpn* [1955] 1 All ER 113, *Summerfield v Hamstead Borough Council* [1957] 1 All ER 221, and *Luby v Newcastle under Lyme Corpn* [1964] 3 All ER 169.

These should be set beside other cases in the field of housing law where the legal issues have arisen in other ways. Thus in *Cochrane v Chanctonbury Rural District Council* [1950] 2 All ER 1134, there was a dispute over a repair notice; and in *Pocklington v Melksham Urban District Council* [1964] 2 All ER 862, there was a dispute over a demolition order. These cases, however, and many more like them, arose under the system of statutory appeals against local housing authorities' administrative decisions to the county court under s 11 of the Housing Act 1957. Thus there is nothing controversial here about the avoidance of judicial review or relator proceedings. Like the limited six-weeks' right of appeal against the Ministerial decisions discussed above in respect of 'preclusive clauses', such cases are brought in a manner expressly laid down by Parliament.

The fundamental principle is the same at the next stage, when it comes to making an appeal in turn against the decision of the county court in every such case—ultra vires. The county court judge substitutes his judgment for that of the local housing authority whether he upholds the latter by confirming their notice or order, or whether he varies or quashes it. But either he acts within the boundaries of objective reasonableness or his decision in turn is liable to be quashed by the Court of Appeal.

The principle here is essentially the '*Wednesbury* principle', from *Associated Provincial Picture Houses v Wednesbury Corpn* [1947) 2 All ER 680. A county court, like an administrative authority, is an 'inferior jurisdiction'. The judges in the superior courts, such as the Court of Appeal, do not concern themselves with the merits of decisions of 'inferior jurisdictions' unless

statute so provides; and the Court of Appeal is in general confined to hearing appeals from county courts on questions of law, so that only legal merits of such decisions are in issue in such proceedings. But this masks another distinction: between issues of law relating to the merits of a decision appealed against and issues of law relating to the jurisdiction governing the decision appealed against. The *Wednesbury* principle, of course, relates solely to the latter. This distinction calls for more attention than it has received.

Speaking of the prerogative orders, particularly certiorari, Denning LJ (as he then was) said, in *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 All ER at p 127: 'The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do.' It acts 'not in an appellate capacity but in a supervisory capacity.' When a county court has decided a case in contract or tort, or any other matter founded on common law an equity, an appeal therefrom to the Court of Appeal is truly an 'appeal' even though confined to matters of law. But when it has decided a case which is founded on a purely statutory question the only central issue is that of ultra vires. In housing law this applies both at the stage when the local housing authority's decision is under review by the county court and at the stage when the county court's decision is under review by the Court of Appeal or the House of Lords. The distinction between the two types of county court decision is the very distinction between private law and public law laid down so authoritatively by Lord Diplock in *O'Reilly v Mackman*.

This point can be pursued a little further. It may be recalled, in support of Lord Denning's statement in the *Shaw* case above, that in *R v Moreley* (1760) 2 Burr at 1042, Lord Mansfield CJ said: 'A certiorari does not go, to try the merits of the question . . . but to see whether the limited jurisdiction have exceeded their bounds.' And in *R v Bolton* (1841) 1 QB at 72, Lord Denman CJ said:

> '. . . the legislature has trusted the . . . jurisdiction in the merits to the [tribunal] below . . . All that we can then do, when their decision is complied of, is to see that the case was one within their jurisdiction.'

Similar remarks about the 'merits' were made by Lawton LJ referring, in *Asher v Secretary of State for the Environment* [1974] 2 All ER at p 166, to the decision of the Secretary of State for the Environment to direct that an extraordinary audit be carried out by the district auditor in regard to the refusal of Clay Cross Urban District Council to raise council house rents in accordance with the Housing Finance Act 1972. He said:

> 'Balancing the advantages and disadvantages of one possible course of action against another and making a decision is what Secretaries of State have to do: it is the very stuff of government and the courts should not interfere save for good reason and disagreeing with the decision is not in itself a good reason.'

This is a statement about the essence of 'public law' and the ultra vires doctrine on which it rests. What is said in it is in principle as true of local housing authorities and official boards of prison visitors as of Secretaries of State. It is just as true and as relevant in regard to county courts. All are limited jurisdictions whose administrative decisions shade into their quasi-judicial and fully judicial decisions. All such decisions must be made within

the bounds of the jurisdiction conferred by Parliament and correspondingly recognised and enforced by the courts of superior jurisdiction. As Lord Denning MR said in *Pearlman v Keepers and Governors of Harrow School* [1979] 1 All ER at p 372 (notwithstanding that this decision was subsequently disapproved by the House of Lords):

> 'The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.'

To which should be added that if a 'preclusive clause' or some other statutory provision should provide that some other method of determining whether decisions are ultra vires should be used instead of judicial review, then that other method must duly be used, and no other, in that case.

Pursuing this fundamental issue further still, we find Lord Diplock in *O'Reilly v Mackman* ([1982] 3 All ER at p 1130) saying that not only the *Anisminic* decision but also *Ridge v Baldwin* was a 'landmark' case. 'I would add a third, *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694.' In *Ridge v Baldwin* [1963] 2 All ER at p 76, Lord Reid commented: 'We do not have a developed system of administrative law—perhaps because until fairly recently we did not need it.' But, says Lord Diplock: 'By 1977 . . . this approach to English law had been removed'—chiefly as a result of those three decisions of the house of Lords.

In 1977 Ord 53 of the Rules of the Supreme Court was revised to take account of this development. Lord Diplock observed:

> 'There is express provision . . . for interlocutory applications for discovery of documents, the administration of interrogatories and the cross-examination of deponents to affidavits. Discovery . . . is obtainable on application whenever, and to the extent that, the justice of the case requires; similarly . . . interrogatories; and . . . cross-examination of deponents to affidavits . . .'

Cross-examination will, however, only be allowed on rare occasions. 'This is because of the nature of the issues that normally arise on judicial review.' With some special exceptions facts will not be in issue

> 'since the tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers . . .'

The exceptions are facts such that, as Lord Radcliffe put it in *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER at p 57, 'no person acting judicially and properly instructed as to the relevant law could have come to the decision appealed against.' This is another formulation of the familiar *Wednesbury* principle. No reasonable body could have come to the decision challenged. In the objective legal sense that decision is unreasonable and so ultra vires, as distinct from the subjective personal sense referred to above by Lawton LJ when he said that 'disagreeing with a decision is not in itself a good reason' for quashing it. Subjective unreasonableness concerns 'merits' of policy or law, but objective unreasonableness concerns 'jurisdiction'. The latter is purely a question of public law, the former is not.

The new, 1977, version of RSC Ord 53 includes injunctions and declarations as remedies available in judicial review proceedings in addition to the

prerogative orders. 'This was not previously the case', as Lord Diplock pointed out ([1982] 3 All ER at p 1132); which brings us back to *Dyson v A-G, Belcher v Reading Corpn*, and like cases, discussed above. The most important of the cases of that kind, however, is *Prescott v Birmingham Corpn* [1954] 3 All ER 689. The plaintiff, a ratepayer, challenged the local authority's decision to remit bus fares for old-age pensioners. He sued in his own name for a declaration, and succeeded (though the effect of the decision was hurriedly reversed by Parliament). The issue was a pure question of public law, applying the ultra vires doctrine and nothing else. Yet the distinction between public law and private law was not canvassed. No statute in that case excluded judicial review, by prescribing some alternative challenge procedure to be followed under a 'preclusive clause' or otherwise. Nor did the victorious complainant bring in the Attorney-General by way of a relator action. In addition there is the question of 'sufficient interest' or 'locus standi', a test which still has to be undergone and successfully passed once it has been established that a complainant today is proceeding correctly by judicial review. Admittedly the courts have tended to hold that a private person proceeding public law against a local authority satisfies the requirement of locus standi merely by being a ratepayer; but this question was not in issue in *Prescott's* case. Perhaps we can say that it was simply taken for granted that he had 'locus standi'.

Prescott would have to behave differently today. He would have to institute judicial review proceedings, or a 'relator' action joining the Attorney-General as co-plaintiff, in the absence of any statutory provision prescribing something different; and in judicial review he would have to pass through the 'filter' of applying for leave to proceed as a preliminary step by demonstating 'sufficient interest' or 'locus standi' to satisfy RSC Ord 53 and the Supreme Court Act 1981 s 31, thus demonstrating that he was not one of the 'busybodies and cranks' denounced by Warner J in *Barrs v Bethell* [1982] 1 All ER 106. As Goulding J said in *Heywood v Hull Prison Board of Visitors* [1980] 3 All ER at p 598:

> 'There are very good reasons (among them an economy of public time and the avoidance of injustice to persons whom it is desired to make respondents) for that requirement of preliminary leave. If an action by writ or originating summons is used instead . . . that requirement of leave is circumvented.'

This point was emphasised by Lord Diplock in *O'Reilly v Mackman* [1982] 3 All ER at p 1133.

> 'Counsel for the appellants . . . conceded that . . . by adopting the procedure of an action begun by writ or by originating summons instead of an application for judicial review . . . the appellants had thereby been able to evade those protections against groundless, unmeritorious or tardy harassment that were afforded to statutory tribunals or decision-making public authorities by Order 53 . . .'

Even though

> 'I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases on which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law',

yet '. . . I have no hesitation, in agreement with the Court of Appeal, in holding that to allow the actions to proceed would be an abuse of the process of the court.'

It has been necessary to dwell at some length on this decision. It is a focal point for lines of historical development in legal authority that go back for several centuries through the evolution at common law of what are now the prerogative orders as well as the evolution of the powers of the Attorney-General and the use of injunctions and declarations, in addition to expounding the reforms embodied in the revision of RSC Ord 53 in 1977 and the enactment of s 31 of the Supreme Court Act 1981. Above all it states a clear, basic issue: there are proceedings in 'public law' and proceedings in 'private law', and this distinction is there to be observed.

Unfortunately, although the distinction is primarily one of substantive law yet the analysis in *O'Reilly v Mackman* seldom strays outside the boundaries of procedural law. It must be stressed that the substantive concept is that of statutory jurisdiction (only vestigally common law jurisdiction independently of statute) which involves the ultra vires doctrine. Yet we know that many statutes require questions of jurisdiction and compliance with the ultra vires doctrine to be determined without recourse to judicial review or relator proceedings—usually with good reason. Consider *Pocklington v Melksham Urban District Council* [1964] 2 All ER 862, referred to earlier. The defendant local authority, purporting to act under powers conferred upon all local housing authorities by Part II of the Housing Act 1957, made a demolition order in regard to the plaintiff's house, which he did not deny was 'unfit for human habitation' as defined in s 4 of that Act. The order imposed the minimum periods allowed for compliance under the Act: 28 days to vacate the house and six weeks thereafter for demolition. The owner exercised his right under s 11 to appeal to the county court, which varied the order by deleting the two periods referred to and substituting a single period of seven years for the requirement to demolish. The authority successfully appealed to the Court of Appeal, which reinstated the two periods originally stated in the order.

It should be noted that this is as pure an issue of 'public law' as that litigated in *O'Reilly v Mackman* or *Prescott v Birmingham Corpn*. The 'merits' of the authority's order were not in issue. County court judges are experts in law, not in housing administration. As Lawton LJ said in *Asher v Secretary of State for the Environment*, referred to earlier, 'the courts should not interfere save for good reason and disagreeing with the decision is not a good reason.' The *Wednesbury* principle of objective reasonableness is the test. There could perhaps have been special factors which made the local authority's choice of the minimum periods allowed for demolition orders to be 'unreasonable' in this objective sense. No such factors seem to have been established. The county court judge's decision to vary the demolition order was therefore an intrusion into an intra vires decision by the local authority, and itself ultra vires. By attacking them when they were acting within the proper limits of their jurisdiction—ie 'reasonably' in the objective *Wednesbury* sense—he was straying outside the proper limits of his own. In addition to that, he disregarded the clear requirements of the Housing Act 1957 s 21, that the demolition order should embody two time-limits: one for vacating the house and one for demolishing it thereafter. The authority, on the other hand, had

complied with these requirements. The Court of Appeal naturally allowed the local authority's appeal. Both the local authority and the county court were 'inferior jurisdictions' subject to the 'supervisory' functions of the superior courts made effective in judicial review. Both were challenged for alleged ultra vires decisions. Both challenges were therefore fairly and squarely within the field of 'public law' as expounded in *O'Reilly v Mackman*. Yet no question of judicial review arose, because the relevant statutory provisions prescribed appeal procedures which were quite distinct from judicial review and relator actions, and more convenient in the circumstances. Nor was injustice caused by 'evading' the 'filter' of establishing the preliminary point of 'locus standi'.

Consider also a case like *Stroud v Bradbury* [1952] 2 All ER 76. The Public Health Act 1936, like the Housing Act 1957 and many another statute, states that authorised officials of a local council are empowered to enter private premises against the wishes of a recalcitrant occupier who is in breach of the relevant statutory rules and regulations, provided that certain prescribed requirements as to due notice and other matters are complied with. In this case officials purporting to exercise this power were sued in trespass, and were held liable because the prescribed requirements had not been complied with. From one point of view their conduct was an intrusion on to private land for which a purported excuse failed: thus they were liable in the tort of trespass. This is a matter of private law. At the same time their conduct purported to be intra vires but was found to be ultra vires the Act of 1936. No-one would seriously complain that the case was handled in a matter which offends against the principles expressed by Lord Diplock in *O'Reilly v Mackman*. But the same question may be in issue some day in more critical circumstances, and it will then be interesting to see what becomes of the 'dichotomy' of public and private law.

Breach of statutory duty

This word 'dichotomy' was used by Lord Bridge of Harwich in the very next reported case: *Cocks v Thanet District Council* [1982] 3 All ER 1135. This deals with the issue just raised, concerning the ease or difficulty with which the distinction between public and private law is to be drawn. Although the facts and arguments were very different from those in *O'Reilly v Mackman* the outcome was essentially the same. Lord Bridge declared that 'the respondent' (ie the plaintiff) 'is not entitled to continue these proceedings or to seek any of the relief he claims otherwise than by an application for judicial review.' The plaintiff's action, as in the previous case, was for a declaration and injunction, and was begun in private and not public law. There was, however, a claim for damages as well; and the action began in Thanet county court though it was in fact soon transferred under a consent order to the Queen's Bench Division of the High Court. But most important of all is the fact that it purported to be a private law action in substance and not merely in form, unlike *O'Reilly v Mackman*. The private cause of action was in tort, for breach of statutory duty.

The plaintiff's claim against the defendant local authority was for the provision of housing accommodation for himself and his family under the Housing (Homeless Persons) Act 1977. The authority disagreed that they

were under a duty to supply permanent housing accommodation to the plaintiff. The substantive issue, if and when tried, would 'probably turn in the end on the question of intentional homelessness', in Lord Bridge's view; and if the plaintiff should be adjudged to be 'intentionally' homeless that means the fault is his and the relevant authority would not be under an obligation to house him permanently. But the case came for decision on the preliminary issue whether as a matter of procedure the plaintiff was entitled to bring his action in the county court for a declaration. The Queen's Bench judge held that he was so entitled, but granted a certificate that a point of law of general public importance was involved, under s 12(3)(b) of the Administration of Justice Act 1969, such that the judge was bound by an existing decision of the Court of Appeal, thus justifying appeal direct to the House of Lords. Leave to appeal was granted.

The apparent cause of action was breach of statutory duty, lying in tort. If this was right the plaintiff must be allowed to bring his action in the way he did. In two Court of Appeal decisions, *De Falco v Crawley Borough Council* [1980] 1 All ER 913, and *Thornton v Kirklees Metropolitan Borough Council* [1979] 2 All ER 349, it was previously held that actions of this kind can be brought. There have been numerous successful actions in tort down the years for breach of statutory duty, at any rate in this century. In *Cutler v Wandsworth Stadium* [1949] 1 All ER at p 551, Lord Normand said that 'the right to a civil action must be established by a consideration of the scope and purpose of the statute as a whole.' As to plaintiffs, 'those who have an interest to enforce one of the statutory duties have an individual right of action.' This would seem to be sufficient to justify the plaintiff's action in the present case. But the inter-relation of statutory duty and the ultra vires doctrine had yet to be considered.

Lord Bridge took the view that there is a 'dichotomy of functions' as far as local housing authorities are concerned under the Act of 1977. There is no apparent logical reason why the analysis should be applied solely to this Act; but it remains to be seen how widely applicable the courts will in fact hold it to be. In the present context Lord Bridge said:

> 'On the one hand, the housing authority are charged with decision-making functions . . . on the other hand [they] are charged with executive functions. Once a decision has been reached by the housing authority which gives rise to the temporary, the limited or the full housing duty, rights and obligations are immediately created in the field of private law. Each of the duties referred to, once established, is capable of being enforced by injunction and the breach of it will give rise to a liability in damages.'

It was the plaintiff's misfortune that Lord Bridge and his colleagues agreed that the authority had not 'reached a decision' giving rise to the 'full housing duty'—or even, perhaps, to any duty. The first stage in the 'dichotomy' referred to above, which comprises the 'decision-making functions', is in fact the public law stage. The second, which comprises the 'executive functions', is the private law stage. 'But it is inherent in the scheme of the 1977 Act that an appropriate public law decision of the housing authority is a condition precedent to the establishment of the private law duty.' Developing this theme a little later on, Lord Bridge spoke of the state of affairs

> 'where the decision of the public authority which the litigant wishes to overturn is not one alleged to infringe any existing right but a decision which, being adverse to him, prevents him establishing a necessary condition precedent to the statutory private law right which he seeks to enforce.'

He then delivered the coup-de-grace. 'Any relevant decision of a housing authority under the 1977 Act which an applicant for accommodation wants to challenge will be of that character.' That is to say, it will be a public law matter, occurring in the exercise of the authority's 'decision-making functions'. If so, it will be open to challenge, as in *O'Reilly v Mackman*, by judicial review and not by an action for damages begun by writ or originating summons in the High Court or their local equivalent which is a plaint in the county court. Lord Bridge and his colleagues held that this was indeed the case here. The local authority's appeal was allowed.

The significant word in the last of Lord Bridge's sentences quoted above is 'relevant'. Not every decision under the 1977 Act necessarily lies within the 'decision-making function' (though the phraseology might lead one to think so). It is therefore an open question in each case, presumably a question of law, if disputed, whether a 'decision' by a local authority under that Act, and presumably under any other Act which gives functional powers to local authorities, comes within the 'decision-making' or the 'executive' function, that is to say within the boundaries of public law or of private law. 'Decision-making functions' is another way of saying 'policy' or 'discretion'. It should be noticed that we are dealing with two kinds of boundaries here. The boundary between the two 'functions' in the 'dichotomy', being those of public and private law, is of fundamental significance. But *within* the ambit of public law are the boundaries of each particular set of statutory functions conferred upon public authorities; and the ultra vires doctrine applies to these. The particular activity of Thanet District Council in the instant case having been held to come within the 'decision-making' or 'policy' sphere, ie public law, it remained open to the plaintiff-respondent to start again by means of judicial review and endeavour to show, if he possibly could, that the local authority's decision was ultra vires the particular powers conferred by the Act of 1977 which were in issue. Even if he were able to show that this was so ('locus standi' would presumably not present much of a problem to him) he must still succeed in persuading the High Court to exercise its discretion in his favour. No-one who applies for judicial review has any remedy 'as of right'.

Immigration

Other administrative law decisions in 1982, although important in their way, are small beer by comparison with *O'Reilly v Mackman* and *Cocks v Thanet District Council*. Immigration, like homelessness, is a subject on which cases continue to come frequently before the courts. Leave to enter the United Kingdom gave rise to some decisions of interest. The first of these is *R v Secretary of State for the Home Department, ex p Jayakody* [1982] 1 All ER 461. The applicant applied to come to England where his wife was training as a nurse. He untruthfully stated in Sri Lanka that he was a single man. On this basis he was allowed in as a visitor for two months. He overstayed that

period; then he disclosed to the Home Office that he had misdescribed his status, and was refused permission to stay on although the Home Office did not claim that he was an illegal entrant. When he appealed, the adjudicator declared that he was an illegal entrant after all. He applied for certiorari to quash that decision. Glidewell J regarded his official transformation from an over-stayer to an illegal entrant as 'a story like Alice in Wonderland' but refused the application. On appeal, however, the Court of Appeal upheld his claim on the ground that a deception—ie a misstatement deliberately made (as in this case) or some other deceit—would only have vitiated the decision to admit him if made in regard to 'material facts'. In spite of the applicant's fears, a statement that he was married was unlikely to have made any difference to the decision to grant him leave to enter.

This case may be contrasted with that of *R v Secretary of State for the Home Department, ex p Khawaja* [1982] 2 All ER 523. Here again there was a deception relating to marital status, but it was held to be material. The applicant was a Pakistani living in Belgium who made a bigamous marriage with a woman living in England. He came over to England but made no mention of this marriage, and was allowed in as a visitor for one month. He then married the woman a second time, in England, but not bigamously in that her first marriage was by this time dissolved. He then applied to the Home Office for an extension of time. Later he informed the Home Office for the first time of his marriage and asked for leave to remain indefinitely. The response was to declare him to be an illegal entrant and authorise that he be detained pending deportation. He applied for judicial review; but it was refused, and the Court of Appeal upheld that decision on the grounds that the conduct of the applicant amounted to deception by non-disclosure of material facts which, if known, would have caused the immigration authorities to refuse him admission. The Secretary of State was entitled to treat him as an illegal entrant. This decision has since been affirmed by the House of Lords: *Khawaja v Secretary of State for the Home Department* [1983] 1 All ER 765.

More technical, but not less important, is the decision of the House of Lords in *Alexander v Immigration Appeal Tribunal* [1982] 2 All ER 766. The applicant applied for leave to enter the United Kingdom for a three-year course of study. The immigration officer, purporting to apply the 'Statement of Immigration Rules for Control on Entry: Commonwealth Citizens', refused leave even though her intention to study was accepted as genuine, because she could not convince him under para 19 of the rules that she would actually leave on completing the course. The House of Lords, reversing the Court of Appeal and restoring the Divisional Court's decision, which had quashed the Immigration Appeal Tribunal's finding reversing an adjudicator's direction in her favour, held that there was a 'sensible' discretion under the Rules to admit her. The officer was not precluded from doing so.

Mention may also be made of the decision of Woolf J in *R v Immigration Officer, ex p Shah* [1982] 2 All ER 264, relating to the power under the Immigration Act 1971 to give a direction to an airline for the removal of an immigrant. The applicant arrived without the necessary entry voucher, and was given merely a temporary permission to remain while his application for entry was considered. It was turned down. Confusion then ensued over the mode of giving directions to an airline for his removal, and he sought judicial

review to quash the directions actually given. It was conceded that they were invalidly given, but the Home Office denied that he had 'locus standi' to challenge them. The judge held that as the directions given to an airline are a necessary part of the procedure under the Act of 1971, and intended to be effective against an immigrant, there is 'locus standi' for him to raise the issue of their validity by judicial review. On the substantive point he confirmed that the directions given were invalid in this case, and added that it would not be a valid exercise of the power to put an immigrant on an aircraft to take him to a country—in this case India—which there was reason to believe was not prepared to receive him.

Fiduciary duty in local authority finance

Finally something should be said of the 'fares fair' case, *Bromley London Borough Council v Greater London Council* [1982] 1 All ER 129, though it was really little more than a nine-days' wonder. This and other cases relating to rate increases and fare reductions purport to be, and are, disputes turning on precise interpretations of detailed provisions in particular statutes, namely the Transport Act 1968 and the Transport (London) Act 1969. Of more enduring importance, however, is the analysis of relevant principles which underline the application of the detailed rules. This is more important than agitated comments from either end of the political spectrum about whether the courts are supposedly helping to 'penalise' ratepayers or 'pressurise' public authorities.

The best point of departure is the observation of Du Parcq LJ in *Kent v East Suffolk Rivers Catchment Board* [1939] 4 All ER at p 184, who said that public bodies 'have to strike a balance between the claims of efficiency and thrift'. This does not mean that policy-making must ever be on a desperate knife-edge, but that *extreme* concern either with enterprises or with savings is a danger to be avoided.

This matter is often expressed in terms of a 'fiduciary duty' owed by local authorities. It is far from clear whether there is one single fiduciary duty or more than one; but the authorities, such as they are, point to two parallel duties. These seem to be: (i) a duty owed to the general public in respect of the proper and responsible management of local authority finances, enforceable by the Attorney-General on the Crown's behalf (*A-G v Aspinall* (1837) 2 My & Cr 613), and (ii) a duty owed to the ratepayers (*Prescott v Birmingham Corpn* [1954] 3 All ER 698). This is presumably another 'dichotomy'. Whether there are really two principles, or only one expressed in two different ways, will perhaps be settled one day. In *Bromley London Borough Council v Greater London Council*, Lord Diplock expressed what he regarded as the relevant overriding principle thus. He said

> 'that a local authority owes a fiduciary duty to the ratepayers from whom it obtains moneys needed to carry out its statutory functions, and that this includes a duty not to expend those moneys thriftlessly but to deploy the full financial resources available to it to the best advantage.'

Neither commitments nor savings are inherently thriftless nor inherently thrifty. 'Thrift', or lack of it, is to be properly judged as a 'question of fact and degree' in the light of all the relevant circumstances of a particular case. In

contexts such as these it is a legal concept, a facet of 'reasonableness' in the context of finance. It must therefore rest on 'reasonableness' in the objective sense, not the subjective sense. In other words the *Wednesbury* principle applies once again. Any local authority can repel the charge of 'thriftlessness' in law unless and until it is clearly established that the relevant financial policies in issue are such that *no* reasonable authority could have pursued them. Mere subjective disagreement will not do, as Lawton LJ pointed out in the Clay Cross case (*Asher v Secretary of State for the Environment* [1974] 2 All ER 156) discussed above.

The material parts of the Transport (London) Act 1969 are as follows. There is a general duty resting on the London Transport Executive to provide public transport for Greater London, subject to guiding principles of policy laid down by the Greater London Council. The Executive must also seek to secure 'efficiency, economy and safety of operation' (s 5(1)). The Greater London Council may 'take such action' as is required to see that the Executive balances its accounts (s 7(6)). Finally, the Council may make grants to the Executive 'for any purpose' (s 3(1)).

The relevant facts were as follows. Knowing that the Government would withhold (in part) the rate support grant if the Council were to reduce fares in a way which did not meet with its approval, the Council issued a supplementary rate precept intended to cover both the amount of grant to be withheld by the Government and the amount of the grant they themselves proposed to make to the Executive to cover the reduction in fares and consequent diminution of revenue. Bromley London Borough Council sought judicial review, saying that their ratepayers, among others in Greater London, were unfairly being made to shoulder a burden which was objectively unreasonable, purely for the benefit of users of public transport.

The House of Lords, affirming the decision of the Court of Appeal which had reversed the decision of the Divisional Court not to restrain the Greater London Council from so acting, held that the 'purpose' in s 3(1) must be consistent with business principles, and that the power under s 7(6) to 'take such action' as was required must therefore be confined to financing operations on a 'break-even' basis. To go to the lengths the Greater London Council did was therefore ultra vires. But it may be noted that the Council subsequently put forward a more carefully prepared scheme for financing fare reductions which was upheld as not being 'thriftless' in Lord Diplock's terminology (*R v London Transport Executive, ex p Greater London Council* (1983) Times, 28 January). Even before that Woolf J (in *R v Merseyside County Council ex p Great Universal Stores* (1982) Times, 18 February, a case under the Transport Act 1968, which applies outside Greater London) refused to quash a decision to issue an additional precept for rates to cover the cost of reducing fares on public transport in the Liverpool area. These schemes were held to be sufficiently carefully considered, and not arbitrary.

Commercial Law

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Banking

Documentary credit and fraud

The House of Lords decision in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1982] 2 All ER 720 clarifies a number of important points relating to documentary credit transactions. The material facts were that the seller, an English company, sold a glass fibre plant to the buyer, a Peruvian company. Payment was arranged under an irrevocable documentary credit issued by the Banco Continental SA ('the issuing bank') and confirmed by the Royal Bank of Canada at its London branch ('the confirming bank'). The letter of credit was expressed to be subject to the Uniform Customs and Practice for Documentary Credit (1974 revision) of the International Chamber of Commerce ('UCP'). The payment arrangements agreed between buyer and seller involved inflating the purchase price to withdraw money from Peru in breach of the Peruvian exchange control regulations in order to transfer it to the United States of America. The seller assigned to the appellant their rights under the documentary credit. Payment under the documentary credit was to be by sight drafts on the issuing bank against delivery inter alia of a full set of 'on board' bills of lading evidencing receipt of the goods on or before 15 December 1976. Shipment was, in fact, made on the American Accord on 16 December. The date of 16 December on the original bills of lading was visibly altered to 15 December. The documents were rejected by the confirming bank. Subsequently, fresh bills of lading were tendered, bearing notation to the effect that the goods were actually on board on 15 December. It was found as a fact by Mocatta J at first instance that the back-dating of the bills of lading had been carried out fraudulently by an employee of the loading brokers to the carriers and this had been done without the knowledge of the seller or the appellant.

At first instance, Mocatta J ([1979] 1 Lloyd's Rep 267) held that the bank had wrongly refused to honour the credit, since the fraud was not committed by or with the knowledge of the sellers, but by a third party. In the Court of Appeal ([1981] 1 Lloyd's Rep 604) it was held that the bank was entitled and in fact under an obligation to reject the documents if fraud was established. The court held that if a document which was false in the sense that it was forged by a person other than a beneficiary could entitle the bank to refuse payment, there was no reason why a document in any way false to the knowledge of such a person should not have the same effect. The House of Lords, however, reversed the decision of the Court of Appeal and upheld the judgment of Mocatta J. The judgment of the House was delivered by Lord Diplock, like Mocatta J, a judge with much experience in these matters. The House of Lords held that the confirming bank's duty to the seller was only vitiated if

there was fraud on the part of the seller, and the bank remained under a duty to pay, even if the documents presented, although conforming on their face to the terms of the credit, nevertheless contained a statement of material fact that was not accurate. Further, the bank was not relieved from liability even if the documents contained a material misrepresentation of fact which the person issuing the documents knew to be false and which was intended by him to deceive persons, including the seller himself, who might deal in the documents thereafter.

The House of Lords decision provides useful authority at the highest level for a number of first principles as to the legal nature of a documentary credit.

First, it gives primacy to the principle of autonomy of the documents. As the UCP art 8(a) states, 'all parties concerned deal in documents and not in goods'. This is amplified by General Provision (c) which provides

> 'credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts'.

Lord Diplock regarded this as 'trite' law. He said

> 'If, on their face, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, that bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price'. ([1982] 2 All ER at 725 c–e)

Secondly, while the speech of Lord Diplock contains numerous references to the UCP, his underlying analysis of documentary credits is in terms of four autonomous though inter connected contractual relationships. These too are regarded as 'trite law' in spite of the fact that legal scholars have been 'excited to a refined frenzy as they sought to conform this peculiar arrangements to ordinary contract doctrine'. (H Harfield *Bank Credits and Acceptances* (5th edn) p 52 (US)). In particular, the relationship between the confirming bank and the seller is explained by Lord Diplock as a contract under which the confirming bank undertakes to pay to the seller or to accept or negotiate without recourse to drawer, bills of exchange drawn by him up to the amount of the credit against presentation of the stipulated documents. No reference is made to possible objections to a contractual explanation of this relationship due to lack of consideration moving from the seller to the bank. (See E P Ellinger 'The Tender of Fraudulent Documents under Documentary Letters of Credit' (1965) 7 Malaya Law Review 24, 25–26. See generally H C Gutteridge and Maurice Megrah QC *The Law of Bankers' Commercial Credits* (6th edn) Chapter 3 especially pp 24 et seq.)[1] An analysis of the underlying relationships in terms of separate contracts runs into difficulties of this kind. As Gutteridge and Megrah state, this 'furnishes an illustration of the inconvenience which often results in the case of commercial contracts from the rules relating to consideration'. (*The Law of Bankers' Commercial Credits* (6th edn) p 25). This inconvenience would have been removed if the

recommendations of the Law Revision Comittee in 1937 (Cmd 5449) had been implemented. It is arguable that the time has come to regard documentary credits as depending on commercial usage which now has the force of law sui generis. From time to time there have been statements that this is already the case and that documentary credits are now part of the Law Merchant. (See *Bank Russo-Iran v Gordon Woodroffe & Co Ltd* (1972) 116 SJ 921, (1972) Times, October 4. See also Omer F Hershey, 'Letters of Credit' (1918) 32 Harv LR 10, 38 and the US cases cited, Finkelstein, *Legal Aspects of Commercial Letters of Credit* pp 289–95.) It is arguable per contra that there are dangers in such an approach in that this is a dynamic area which might lose its flexibility by absorption into the common law. However absorption into statute form in the Uniform Commercial Code in the USA has not apparently had this result. Probably the most common sense view is that expressed by Henry Harfield, a leading American expert,

> '. . . the banker's letter of credit is a legally enforceable instrument, rooted in the law merchant and contractual in its nature. There is neither need nor utility to employ Procrustean techniques to establish its validity'. (*Bank Credits and Acceptances* (5th edn) p 55).

As the International Encyclopedia of Comparative Law states, the irrevocable letter of credit is an instance where pre-existing legal categories are only of marginal help, since it embodies a new species of formal abstract promise. (Vol IX, Chapter 5, Letters of Credit (B Kozolchyk) p 143.)

Thirdly, the case establishes new law on the question of fraud. In the past, banks have been in a dilemma due to the fact that they are under conflicting obligations. On the one hand, they must accept documents which appear to conform on their face. On the other hand, exercising reasonable care, they must reject fraudulent documents. What the House of Lords decision does in this case is to make it clear that where the fraud is done without the knowledge of the seller, the bank must still honour the credit. Presumably, knowledge here by the seller would extend to inferred knowledge. If fraud is committed which benefits the seller and he turns a blind eye then presumably the bank would be entitled and obligated to reject the fraudulent document. (See Mocatta J at first instance [1979] 1 Lloyd's Rep at 278.) Although this clarifies the bank's responsibility, it does not make it any easier in practice. Banks will not be particularly happy with honouring a credit when they know that the documents are fraudulent, but it cannot be proved that the seller knew of the fraud. It has been suggested by Professor Clive Schmitthoff that it would be desirable that the next revision of the UCP should expressly authorise banks to refuse to honour a credit if fraud is established irrespective of whether the seller is a party to the fraud. (See C M Schmitthoff [1982] JBL 319, 321, cf also R M Goode 'Reflections on Letters of Credit—I' [1980] JBL 291, 294[2] and C Lewis 'Fraud in Documentary Credits' [1983] 80 LS Gaz 335.) With this one would respectfully agree, although there is some penumbra of uncertainty around what is meant by 'established' in this context, which would need to be resolved. (See Mocatta J at [1979] 1 Lloyd's Rep 276, Lord Denning MR in *Edward Owen v Barclays Bank* [1978] 1 Lloyd's Rep 166, 171 citing the leading American case of *Sztejn v Schroeder Banking Corporation* (1941) 31 NYS 2nd 631. Cf Megarry J in *Discount Records Ltd v Barclays Bank Ltd* [1975] 1 WLR 315, 320. For a useful detailed discussion of

this question see E P Ellinger *Documentary Letters of Credit* pp 190–197.) It is interesting to note that the fraud here consisted of the offence of forgery, although this point was not pleaded or argued before Mocatta J, and the Court of Appeal refused to allow it to be raised before them ([1981] 1 Lloyd's Rep 623). Back-dating a document could have constituted forgery by virtue of ss 1, 2 and 18 of the Forgery Act 1913. (Section 1(1), (2), s 2(2)(c) and s 18(1). See *R v Ritson* (1869) LR 1 CCR 200, *R v Wells* (1939) 27 Cr App Rep 72, [1939] 2 All ER 169. The matter is now expressly provided for in the Forgery and Counterfeiting Act 1981 s 9(1)(g).) Here the Court of Appeal seems to have taken the view that if forgery had been established it would have invalidated the bill of lading as a conforming document. In the House of Lords, Lord Diplock did not share that view. He did not regard the back-dating as having that effect. It is submitted that his view is consistent with that of Devlin J in *Kwei Tek Chao v British Traders & Shippers* [1954] 2 QB 459 where Devlin J distinguished the company law cases which hold that forgery renders a document a nullity. (This case is noted by L C B Gower (1954) 17 MLR 260.)[3] It is submitted that in the commercial context a relativist approach to forgery, such as was manifested by Devlin J, is to be preferred. Devlin J distinguished between the heart and a limb of the documents. If the forgery goes to the heart of the document then it is a nullity. Back-dating a bill of lading in circumstances such as these would not go to the heart of the document. If forgery by a third party unknown to the seller rendered the document a nullity, Lord Diplock did not think that it necessarily entitled the confirming bank to refuse to pay the seller but preferred to leave the matter open. It is submitted that a nullity should never constitute a conforming document.

International maritime fraud seems to be on the increase and at present there is no central clearing house for shipping documents. Any attempt to introduce one to cope with all the millions of documents in circulation would probably add considerable cost and result in unacceptable delays. If any system of clearing was, however, to be considered a body such as the International Maritime Bureau of the International Chamber of Commerce making full use of an international computer link up would seem appropriate. (See E Ellen and D Campbell *International Maritime Fraud* p 124).

Last, the House of Lords decision is of general interest because it shows the willingness of the English courts to consider the UCP, formulated by the International Chamber of Commerce and accepted by British and Commonwealth banks, not only as a source of contractual terms, but also as something approximating to doctrine in this area. In addition, the speech of Lord Diplock shows a willingness by the English courts to consider US and other overseas authorities on documentary credits—a willingness moreover which is reciprocated. Since this branch of law is truly international, such an approach is not only welcome, but vitally necessary. In this sense at least the law of documentary credits has the characteristics of modern Law Merchant.

Notes

1 It is of course possible to argue that after receiving the irrevocable credit, the seller may be regarded as forbearing to claim from the buyer. See *Dexters Ltd v Schenker & Co* (1923) 14 Ll LR 586, 588 where the issue of lack of consideration was raised but withdrawn by counsel.

2 Professor Goode's article was cited by Stephenson LJ in the Court of Appeal and seems to have influenced the Court on the point that a fraudulent bill of lading does not become a conforming document merely because the fraud is that of a third party. With respect the real point is whether under UCP such falsity prevents apparently conforming documents from being accepted in such circumstances. The House of Lords thought not.

3 There was an assumption in *Kwei Tek Chao* that there was a right to reject the documents but this was not in issue in the case. The case was in fact cited in the Court of Appeal and accepted by Stephenson LJ at [1981] 1 Lloyd's Rep 618 and Ackner LJ at 628 who nevertheless regarded *any* forgery *by anyone* as preventing a document from being a conforming document.

Currency control

The House of Lords decision in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1982] 2 All ER 720 also deals with some interesting points of private and public international law relating to currency control. The general principle of English private international law is that exchange control legislation of a foreign country will be enforced where the object is to protect the economy but not where it is used as an instrument of oppression or discrimination. The Bretton Woods Agreement which set up the International Monetary Fund is consistent with this principle. (Cf the US Supreme Court case of *Kolovrat v Oregon* 366 US 187). By virtue of the Bretton Woods Agreement Order in Council 1946 made under the Bretton Woods Agreement Act 1945 to give effect to the Bretton Woods Agreement;

> 'Exchange contracts which involve the currency of any Member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member . . .' [1]

In *Sharif v Azad* [1967] 1 QB 605, at 618 a–b Diplock LJ said that the order made such a contract unenforceable not illegal. He also said that the term 'exchange contract' was not defined, but should be liberally construed having regard to the objects of the Bretton Woods Agreement to protect the currencies of the states who are parties thereto. Lord Denning MR following Dr F Mann (see Kerr J in *Wilson, Smithett & Cope Ltd v Terruzzi* [1976] 1 QB 683 at 698–699) considered that 'exchange contract' meant any contracts which in any way affected a country's exchange resources ([1967] 1 QB 605, 613 G-4A). However in *Wilson, Smithett and Cope Ltd v Terruzzi* ([1976] 1 QB 683 at 698–699), Kerr J in a detailed judgment rejected Lord Denning's wide interpretation and preferred that of Dr Nussbaum, ('Money in the Law—National and International' 542 et seq; (1949) 59 Yale LJ 421) namely that 'exchange contracts' are contracts to exchange the currency of one country for the currency of another. The Court of Appeal presided over by Lord Denning affirmed Kerr J.

In the *United City Merchants* case the agreement between the buyer and seller involved an artificially inflated price in US dollars and a collateral agreement by the seller that it would hold the excess as trustee to transmit to the account of the buyer in America. This latter arrangement was held to be 'a monetary transaction in disguise' and that part of the documentary credit was held to be unenforceable. The House of Lords held that where a contract is

unenforceable under that order as a monetary transaction in disguise, this is not a question of construction, but one of looking to the substance of the transaction ([1982] 2 All ER at 730 b–d per Lord Diplock). It is, therefore, not strictly accurate to talk of severability. The task of the court is to penetrate any disguise to identify any monetary transactions which the words intended to conceal and to refuse to enforce the contract to the extent that to do so would give effect to the monetary transaction. The Court of Appeal and House of Lords both held that the seller was entitled to judgment for that part of the relevant instalment which was not a monetary transaction in disguise.

This aspect of the House of Lords judgment is interesting for the following reasons.

First, it provides clear authority for the narrow interpretation of 'exchange contract'.[2] Although there is some European support for the wider interpretation (see F A Mann *The Legal Aspect of Money* (4th edn) 383 et seq) the American courts have favoured the narrow approach and this can be justified by the reference to 'currency' rather than 'exchange resources' in the Order. (See *Banco Do Brasil, SA v Israel Commodity Co* 239 NYS 2d 872, 874 and *J Zeevi & Sons Ltd v Grindlays Bank (Uganda) Ltd* 371 NYS 2d 892, 900).

Secondly, the House of Lords supports Lord Denning's approach in the *Terruzzi* case of looking to the substance and not the form. This equitable approach was adopted by Lord Denning in reliance on Dr Nussbaum's article in 59 Yale LJ 421, 427 where he referred to 'monetary transactions in disguise'. Lord Diplock adopts the phrase but appears to attribute it to Lord Denning.

Thirdly, the House of Lords adopted what Lord Denning MR said about the meaning of 'unenforceable' in the unreported case of *Batra v Ebrahim* [1977] CA Transcript 197B. Lord Denning said it did not make the contract illegal. However the word should be interpreted to promote the general legislative purpose which here meant that the court itself must take the point.

Fourthly, the House of Lords, like the Court of Appeal, disagreed with Mocatta J who held that the whole documentary credit was tarred with the same brush. It held that only the part of the amount which represented the monetary transaction in disguise was so tainted. On the other hand this simply meant that it would not be enforced by the courts. Because of this the confirming bank could have resisted payment of that part but there was nothing to prevent it under English law from paying out voluntarily ([1982] 2 All ER at 730 g–h). This approach is different from that of American law and is inconsistent with the principle of autonomy of the documents to which they had given primacy on the documentary credit front. (See F A Mann *The Legal Aspect of Money* (4th edn) 391). In *J Zeevi & Sons Ltd v Grindlays Bank (Uganda) Ltd* 371 NYS 2d 892, 900, which does not appear to have been cited, the Court of Appeals of New York adopting the narrow view held that a letter of credit was not an exchange contract. (For a strong criticism of the case see John S Williams (1975) 9 Corn ILJ 239, 243.) It is, however, difficult to see why not and the case is really one of discrimination which arguably falls outside the rule anyway.

Fifthly, the general approach of the House of Lords is more reminiscent of equitable doctrine than common law severance and would appear to allow the courts more scope. It is ironic that this takes place as part of a narrow interpretation of 'exchange contract'. Before exercising such powers,

however, it might be useful in some cases for the parties or the English courts to resolve the threshold question with the IMF of the scope of the foreign exchange control regulations and whether they are consistent with the Agreement. Finally, in the light of differences between courts and jurists of high standing in leading member states about the interpretation of some of the key concepts it would seem desirable for member states to seek a resolution of the differences in interpretation of the Agreement by the executive directors under Article XXIX of the Second Amendment to the IMF Agreement. This is subject to a right of appeal to the board of governors whose decision is final. Before reaching a final opinion the board could request an advisory opinion from the International Court of Justice.[3] This would be useful although not necessarily binding on the English courts.[4]

Notes

1 For an early interpretation of this provision by the Board of Executive Directors of the International Monetary Fund see (1954) 3 ICLQ 262.
2 On this question see Nussbaum op cit, F A Mann *The Legal Aspect of Money* (4th edn) 383 et seq, J Gold *The Fund Agreement in the Courts* 54, J Gold *The Fund Agreement in the Courts* Parts VIII–XI 43 et seq, J Gold *The IMF and Private Business Transactions* 20 et seq, D Carreau, T Flory and P Juillard *Droit International Economique* 238–9.
3 See Charter of the United Nations, art 96(2), IMF, Summary Proceedings (Board of Governors) 1947, 52, Nussbaum *Money in the Law—National and International* 529, J Gold *Interpretation by the Fund*, L Lazar *Transnational Economic and Monetary Law, Transactions and Contracts* Book 3 Chapter 4 passim; cf Mann, *Studies in International Law* Chapter XVIII.
4 Mann op cit 606, (1968–9) BYBIL 1, 13. Cf, however *Kahler v Midland Bank* [1948] 1 All ER 811, 819 per Evershed LJ obiter and C H Alexandrowicz *World Economic Agencies (Law and Practice)* 201.

Bankruptcy

Creditors' rights on an application for discharge

In *Re Stern (a bankrupt), ex p Keyser Ullman Ltd v The bankrupt* [1982] 2 All ER 600 (CA) in 1978 a receiving order in bankruptcy had been made against William George Stern who was a director of many property companies. Claims against him amounted to over £118 million. His assets produced £20,252. In 1981 he applied for his discharge. His application was opposed by two of his creditors, whose debts amounted to over £60 million, on the ground set out in s 26(3)(f) of the Bankruptcy Act 1914, that the bankrupt had brought on or contributed to his bankruptcy by rash and hazardous speculations. At the hearing of his application, the opposing creditors sought to cross-examine him and two of the deponents of the affidavits in support of his application. One of the deponents was Sir Kenneth Cork who had acted as the liquidator of the bankrupt's group of companies. The registrar refused to allow the opposing creditors to cross-examine on the ground that the cross-examination was likely to be directed to the bankrupt's conduct before the receiving order and that was irrelevant to the issue that the court had to decide. The creditors appealed, arguing that s 26(7) conferred a right

on a creditor to cross-examine a bankrupt who applied for a discharge. Section 26(7) provides:

> 'Notice of the appointment by the court of the day for hearing the application for discharge shall be published in the prescribed manner, and sent fourteen days at least before the day so appointed to each creditor who has proved, and the court may hear the official receiver, and the trustee, and may also hear any creditor. At the hearing the court may put such questions to the debtor and receive such evidence as it may think fit.'

The Court of Appeal held that the sub-section did not entitle an opposing creditor to cross-examine the bankrupt as of right, but it did confer on the court a discretion to receive evidence. Lawton LJ said (at p 605 h–j) that creditors are entitled to make submissions to the court to protect their own financial interests and to ensure that they and others are never again, or at least for some time, exposed to the kind of financial operations which the bankrupt has used. Although the particular creditors might never deal with the bankrupt again, 'in the world of high finance and commerce one reckless operator can cause havoc amongst many besides his immediate victims'. In the circumstances, therefore, the registrar was wrong to state that the creditors had no financial interest except to the extent of any contribution which the bankrupt might make. The court's right to question the bankrupt was for the purpose of ensuring that the grant of discharge did not prejudice the public generally. In most cases the court would glean all necessary information from the Official Receiver's report. In others, such as the present case, the size of the indebtedness and the circumstances in which the debts were incurred might call for some explanation from the bankrupt. In such circumstances, the registrar could either himself put the questions, or could ask or allow some other person to put them. In most cases the appropriate person would be the Official Receiver or trustee, but it could be a creditor. A creditor had no right, but the registrar could in his discretion allow them to cross-examine. As to the weight of such evidence, it also was in the discretion of the court. The court could take it into account if satisfied that it was relevant to any issue which the court had to consider in relation to discharge. Templeman LJ explained the reason for the court having a discretion in the matter. It was, he said (at p 608 a–b) because of the waste of money and time and unfairness which might result if an opposing creditor 'possibly unaffected by the outcome and possible activated by malice' was entitled to cross-examine as of right. In his view, in many if not most cases, the court would consider that it would not be assisted by further cross-examination of this kind. On the other hand the court might feel that it would be assisted by such cross-examination, or might feel that in the circumstances it would be unfair to an opposing creditor to refuse to allow him an opportunity of asking questions to establish the grounds of his opposition.

The circumstances of the *Stern* bankruptcy were undoubtedly extremely unusual in spite of the Official Receiver's view that it was a very ordinary bankruptcy but with noughts on the end. The collapse of the property market, the magnitude of the debts, the huge personal guarantees which the bankrupt had entered into, and his family connections which continued to keep him in the manner to which he was accustomed, all contributed to its unusualness. It is therefore very surprising to learn that the public examin-

ation of Stern only lasted two days. No wonder, therefore, that the opposing creditors appealed against the registrar's ruling.

The case illustrates three distinctive characteristics of bankruptcy adjudication—the inquisitorial nature of many of the proceedings, the key role of the Official Receiver and Trustee and the large measure of discretion conferred on the court. It is sometimes argued that bankruptcy is more rule orientated than winding up. To some extent this is true. Many matters of administration are the subject of rule rather than discretion in bankruptcy, but the basic procedure of discharge *on the application of the bankrupt* is, one might argue necessarily, discretionary. The circumstances of each bankruptcy are in a sense unique. It would be a mistake, therefore, to confine discharge within too rigorous a set of rules. However, the absence of rules results in the absence of rights for creditors as well as the bankrupt, as the present case illustrates. The Court of Appeal's reasoning sanctioned a liberal exercise of the discretion to allow cross-examination by creditors in unusual circumstances. The likely assistance provided by the cross-examination was regarded as material. However, Templeman LJ in his reference to fairness to the opposing creditors raised a further ground of uncertain scope. Where a public examination has been dispensed with, or has been as short as the present one, it may be difficult for an opposing creditor to obtain all the necessary information. Presumably, the unfairness referred to by Templeman LJ is only intended to cover this and does not cover unconscionable conduct by a bankrupt prior to the receiving order. In this case in any event there was not likely to be evidence of such conduct. The colossal indebtedness arose out of company activities which were the subject of a successful scheme of arrangement under s 206 of the Companies Act 1948 which enabled an orderly realisation of properties to take place. In this the bankrupt seems to have co-operated.

Finally, it should be noted that the bankrupt's application for discharge was under the original provision in s 26 of the Bankruptcy Act 1914. This provides for the initiative to be taken by the bankrupt himself. Section 7 of the Insolvency Act 1976 provides for automatic discharge and s 8 provides for discharge on the application of the Official Receiver. Similar wording to s 26(7) appears in s 8(5) of the 1976 Act and the principles set by the present case in relation to s 26(7) should apply to s 8(5).

The latest development in the case is that a second application for discharge has been heard in the High Court by Walton J. A hearing of such an application by a High Court judge is unusual. They are normally dealt with by the registrar. At the end of the hearing Walton J granted a discharge suspended for two and a half years. The bankrupt offered to pay £500,000 spread over three years out of funds provided by his family in the United States. Walton J said that this was only a tiny part of the debts but nevertheless was a substantial sum and probably the largest amount ever offered by a bankrupt in these circumstances (*The Guardian*, 29 March 1983, p 3).

The rule in Ex p James and subrogation

The so called rule in *ex p James (Re Condon, ex p James* (1874) LR 9 Ch App 609, [1874–80] All ER Rep 388) is a leading principle of bankruptcy administration. In essence it provides that a trustee in bankruptcy as an officer of the court, may be restrained from enforcing a claim or retaining money if it is

> 'not honourable—if it were not high minded—if it would be contrary to natural justice—if it would be shabby—if it would be a dirty trick for him to retain it'

(per Scutton LJ summarising earlier formulations of the principle in *Re Wigzell, ex p Hart* [1921] 2 KB 835 at 858). In *Re Tyler* [1907] 1 KB 865 at 873, [1904–7] All ER Rep 181 at p 185 c–d Buckley LJ expressed it in a more temperate way—

> 'Assuming that he (the officer of the court) has a right enforceable in a Court of Justice, the Court of Bankruptcy or the court for the administration of estates in Chancery will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do.'

The true basis of the principle is that the courts have two functions—one to decide the rights between the parties and the other to administer estates. In administering estates the court by its officer may find itself in the position of a quasi litigant. As Farwell LJ said in *Re Tyler* (at 871), in such circumstances 'It would be insufferable for this court to have it said of it that it has been guilty by its officer of a dirty trick'. The problem with the principle is that it represents a matter which is almost exclusively one of ethics rather than law. As Salter J said in the Divisional Court in *Re Wigzell* [1921] 2 KB at 845 (approved in the Court of Appeal at 852 and 859)

> 'Legal rights can be determined with precision by authority, but questions of ethical propriety have always been, and will always be, the subject of honest difference among honest men'.

However, it can be argued that the discretion must be acted on on judicial principles (per Vaughan Williams LJ in *Re Tyler* [1907] 1 KB 865, 870) and what the courts are concerned with is not plumbing the depths of ethical propriety, but recognising particular cases of ethical impropriety when they see them. This is analogous to the point that whereas it is difficult exhaustively to define good faith it is possible to identify particular instances of bad faith. Indeed there is a close link between the rule in *ex p James* and bad faith.

in *Re Byfield (a bankrupt), ex p Hill Samuel & Co Ltd v The Trustee of the Bankrupt* [1982] 1 All ER 249 a receiving order had been made against a bankrupt on 23 March 1979. It was gazetted in the London Gazette dated 29 March 1979. On the facts it was not clear whether that particular issue had been published on that date, but it was common ground that it was 'in effective publication' on 4 April 1979. On 5 April the bankrupt had instructed her bank to transfer a sum of £19,500 standing to her credit at the bank to her mother's account at another bank. The bank in good faith and without knowledge of the receiving order or the purpose of the transfer, effected the transfer. The bankrupt's mother used £12,356 to pay off some of the creditors. The balance was handed over by the mother to the trustee in bankruptcy. The trustee called on the bank to pay to him the unrecovered balance of £12,356. The bank paid that sum and lodged a proof of debt for that amount on the alternative grounds (1) that it was within the rule in *ex p James* or (2) that the bank was entitled to be subrogated to the rights of the creditors who had been paid off by the mother. The trustee rejected the proof. The bank moved to have his decision reversed.

Goulding J dismissed the motion. His Lordship said that in general the rule in *ex p James*, subject to certain exceptions, had been applied to cases where the point in question was 'intimately linked with some voluntary conduct of the trustee in bankruptcy himself' ([1982] 1 All ER at 252 b–c). He relied on a passage in Younger LJ's judgment in *Re Wigzell* ([1921] 2 KB at 869–870) where it was said that it was not obvious that a creditor who had simply been tricked by the bankrupt

> 'has any equity at all as against the other creditors of the same bankrupt, who may all have been equally tricked, merely because in his case the proceeds of the transaction can be traced amongst the bankrupt's assets and in the other cases they can not'.

That language was not precisely applicable to *Re Byfield*, but Goulding J thought that the important point was that the payment had been made on the instructions of the bankrupt, not the trustee. In his opinion, there was nothing offensive either to commercial or general morality in the general body of creditors receiving a windfall from the bank's mistake in the circumstances.

With regard to the claim based on the equitable right or remedy approximating to subrogation, Goulding J said that he felt obliged to stop his 'ears to the siren song of unjust enrichment' ([1982] 1 All ER at 256 f). While apparently responsive to the claim in principle, he considered that there was a logically anterior question to be resolved of whether there was any doctrine which entitled the bank to stand in the shoes of the creditors. The basis of the claim, which appeared to fall potentially within the class of subrogation which defeats classification 'except as an empirical remedy to prevent a particular kind of unjust enrichment' (per Lord Diplock in *Orakpo v Manson Investments Ltd* [1978] AC 95, at 104E) was a dictum of Younger LJ in *Re Wigzell* where he said that when the creditors as 'the constituents of the trustee' benefited by the transaction they should take it subject to the rule in *ex p James*. The dictum provided no clear support for the subrogation argument and the facts and aftermath of *Re Wigzell* really stood in the way of this claim.

In *Re Wigzell* the debtor had obtained a stay of advertisement of the receiving order pending the appeal. The appeal was unsuccessful, but meanwhile pending the appeal the bankrupt had paid in money and drawn out a large sum. The bank had acted in good faith and without knowledge of the receiving order. Although the Court of Appeal was sympathetic, under the law as it stood it could grant the bank no relief. The aftermath of the case was that s 4 of the Bankruptcy (Amendment) Act 1926 was passed whereby any money paid before notice of the receiving order in the London Gazette was validated. Goulding J said that that statutory provision was the limit of the bank's relief. He stressed that this was not a case in which the bank had made a payment for the express purpose of paying creditors. It is submitted that if instead of paying out money standing to the credit of the bankrupt the bank had advanced money for the specific purpose of paying creditors and this had not been done, the bank would have been entitled to recover this money on the basis of a trust in accordance with the House of Lords decision in *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567. However the *Quistclose* principle could not apply to the circumstances of the present case because (1)

it was the bankrupt's credit balance, not a loan which was paid out and (2) the money was actually used in part to pay creditors.

It would seem that *Re Byfield* is consistent with modern authorities on subrogation and that the decision on the application of the rule in *ex p James* can be amply justified. Although Ashburner *Principles of Equity* (2nd edn) p 243 describes the doctrine of subrogation in general terms the courts have shown a marked reluctance to permit subrogation which does not fall under established categories. A similar reluctance was earlier manifested in relation to the extension of the action for money had and received. As Lord Sumner said in *Sinclair v Brougham* [1914] AC 398, 456

> 'There is no ground left for suggesting as a recognisable "equity" the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer'.

Although the siren song of unjust enrichment has often echoed through the courts in recent years the judges have refused to recognise any unifying general doctrine. Lord Diplock said recently in *Orakpo v Manson Investments Ltd* [1978] AC 95 at 104 C–D:

> '. . . there is no general doctrine of unjust enrichment recognised in English Law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law.'

(See however Sir R Goff and G Jones *The Law of Restitution* (2nd edn) pp 11 et seq). *Re Byfield* then conforms to this trend.

As regards the rule in *ex p James* the so called rule is an imprecise principle which confers a discretionary power on the court (see Lord Keith in *Government of India v Taylor* [1955] AC 491 at 512–3) and to have applied it in *Re Byfield* would have represented an extension of the existing authorities. The decision of Goulding J represents the modern tendency to restrict the principle (see Goff and Jones op cit pp 99–102) which can be justified here on the basis that it was essentially the act of the bankrupt, there was no bad faith on the part of the trustee and a payment such as this was made the subject of express statutory relief in 1926. To grant additional relief under the rule in *ex p James* in the present circumstances would in effect have been to extend the statute by analogy. This approach, while permissible in civilian jurisdictions, has not found favour in the common law world since Tudor times.[1]

Note

1 See Coke 1 Inst 24 and Plowden's note to *Eyston v Studd* (1574) Plow 459, 465. See also S E Thorne, 'The Equity of a Statute and Heydon's Case' (1936) 31 Illinois LR 202, cf *Magor & St Mellons RDC v Newport Corpn* [1952] AC 189.

The validity of a bankruptcy notice and petition

A bankruptcy notice in order to comply with s 1(1)(g) of the Bankruptcy Act 1914 must refer to a final judgment or order. In *Re Wheeler (a debtor)* [1982] 1 All ER 345 there was a complicated dispute which arose out of a dissolution of partnership between four accountants. We need not concern ourselves with the details of the litigation, except to note that a bankruptcy notice

served on one of the partners referred to four orders, namely, an order for costs in an action and an order for costs in three procedure summonses. The issue was whether this complied with s 1(1)(g). The Court of Appeal held that it did because the four orders had been channelled into an interim certificate which referred to a total indebtedness and this was referred to in the notice. The interim certificate amounted to 'a final order' for the purpose of the sub-section even though enquiries as to damages and profit had not been completed. The Court of Appeal followed *Re Alexander, ex p Alexander* [1892] 1 QB 216 where the court had held that an order as to costs was a 'final judgment' in spite of the fact that an order had been directed for an account. The Court of Appeal distinguished the case of *Re Low* [1891] 1 QB 147 in which there have been two separate actions and judgment given in each. In the present case there was one action with a number of interlocutory orders made in the action.

One other bankruptcy matter raised by the case had been mentioned to the court by the registrar. This was that under s 4(2) of the Bankruptcy Act 1914 a petitioning creditor who is a secured creditor must state in his petition either that he is willing to give up his security, or give an estimate of the value of his security. In the present case security had been given by another party and the Court of Appeal had no difficulty in holding that merely because a judgment creditor held a security from someone who was jointly and severally liable with the debtor he was not a secured creditor of the debtor within the meaning of s 167 of the 1914 Act. Section 167 provides that a secured creditor means

> 'a person holding a mortgage, charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor'.

Sale of Goods

Ascertainment, appropriation and passing of property in cif contract

There are three legal concepts in sale of goods which are similar and overlap in practice but are not the same—ascertainment of unascertained goods, appropriation, and passing of property. (See R M Goode *Commercial Law* pp 166 et seq for a valuable discussion.) Ascertainment is concerned with identification *after* an agreement has been entered into and is a pre-requisite of passing of property in the goods. (Goods identified at the time of the contract constitute specific goods under s 61(1). Where the contract is unconditional and the goods are in a deliverable state the property normally passes when the contract is made (s 18 Rule 1).) Appropriation is the second stage when goods possessing the necessary attributes are set aside in some way to the contract so that the seller ceases to be entitled to proffer, or the buyer to take other goods, even with the same attributes. By itself it does not pass the property in the goods. Ascertainment and appropriation are inevitably closely linked in practice. Usually the act of appropriation will be the method of ascertainment. Both concepts are closely linked with the passing of property in the Sale of Goods Act as a perusal of the relevant sections reveals. Section 16 of the Sale of Goods Act provides

> 'Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained'.

Section 18 provides that

> 'Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer . . . Rule 5(1). Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made . . .'

In *Karlshamns Oljefabriker v Eastport Navigation Corp* [1982] 1 All ER 208 (hereinafter called *The Elafi*) these questions arose in the case of a sale of goods under cif contracts which were damaged before discharge. The goods were quasi-specific (see Goode *Commercial Law* p 169) in the sense that they formed part of a larger cargo but were unappropriated at the time of the shipment. The issue of when property passed was crucial if the Bills of Lading Act 1855 did not apply and it was necessary to sue in tort for negligence as owners of the goods.

The material facts of the case were that the buyers purchased under four identical cif contracts, a total of 6,000 metric tons of copra to be shipped from the Philippines to Sweden. The consignment was part of a cargo of 22,000 tons of copra, the balance being off-loaded at Hamburg and Rotterdam. In an action by the buyers against the shipowners in tort, the shipowners contended that the property had not passed to the buyers until the copra was discharged in Sweden, by which time the damage had already occurred.

Mustill J stated the law as follows. Where there is a single contract between the parties covering the whole of the consignment of goods on cif terms, property normally passed when the shipping documents are negotiated because the cargo is ascertained and appropriated from the outset. Where half of the cargo is sold to two separate buyers no property passes until the goods have been discharged and a physical separation effected, and this is so even if the sale is on cif terms. Where the whole of the cargo has been sold to the claimants under four contracts of sale and there has been no physical separation in the hold, the matter was governed by *Wait & James v Midland Bank* (1926) 31 Com Cas 172 which held that there can be ascertainment by exhaustion. In the present case there was ascertainment by exhaustion after the remainder of the cargo had been delivered at Rotterdam and Hamburg. On the question of appropriation, his Lordship said that s 18 Rule 5(1) did not make it a pre-condition of the passing of the property, but merely created a presumption to that effect which was rebuttable if 'a different intention appears'. Normally the act of ascertainment is simultaneous with the act of appropriation. However, ascertainment by exhaustion in the case of sale of goods held in bulk is an exception. There can be ascertainment and passing of property without a separate act of appropriation. There is, therefore, a contrary intention for the purposes of s 18. Here, in the case of goods subject to the cif contracts, property passed upon ascertainment. This 'released the inhibition on the passing of property' which would otherwise have passed on handing over of the shipping documents. Presumably the 'inhibition' referred to by Mustill J was a condition precedent. The fact that the goods had

been sold under four separate contracts did not prevent this happening. The buyers, therefore, had title to the copra at the time when it was damaged and had locus standi to sue the shipowners in tort.

The decision of Mustill J contains a useful analysis of the law and practice on ascertainment, appropriation and passing of property in a cif contract. Obviously if the four contracts had been the subject of sub sales there would not necessarily have been ascertainment for the purpose of such sub contracts until the particular parts of the consignment had been separated. The case highlights the complexity of the law of sale of goods forming part of a larger bulk which is due to the fact that the courts have rejected co-ownership of the whole and equitable interests in the relevant parts. Of the latter Sir Frederick Pollock said (see his note on *Re Wait* [1927] 1 Ch 606 in (1927) 43 LQR 293) that it would be 'as inconvenient to many merchants as it is surprising to the Equity Bar' and indeed it was. What is needed is reform on the lines of either s 17 of the American Uniform Sales Act or s 2–105(4) of the Uniform Commercial Code. (See Andrew G L Nichol 'The Passing of Property in Part of a Bulk' (1979) 42 MLR 129, 142.) These allow property to pass in an unascertained part of a bulk and seem to work in practice.

The decision also highlights the artificiality of buyers of parts of bulk cargos being obliged to sue the carrier in tort. The problem arises because s 1 of the Bills of Lading Act 1855 is on the face of it inadequate to transfer rights and duties to the consignee or endorsee where the transfer of property is not made 'upon or by reason of' the consignment or endorsement. Here Mustill J offered some interesting obiter dicta ([1982] 1 All ER at 217 f–g). He said that his tentative opinion was that the Act could apply to a transaction where the property passed at some time other than the moment of indorsement and transfer so long as the act of indorsement formed an essential link in the chain of events by which title is transferred. These dicta, however, appear to be inconsistent with the decision of McNair J in *Gardano and Giampieri v Greek Petroleum* [1961] 2 Lloyd's Rep 259 which was not cited. On the whole the liberal interpretation of Mustill J is preferable but it would be better in the circumstances for legislative reform to take place by a suitable amendment to s 1 of the Bills of Lading Act 1855 to clarify the matter. (See P N Todd 'Bulk Buyers and Economic Loss' [1983] JBL 42, 54, Nichol (1979) 42 MLR 142, cf s 1–201(5) Uniform Commercial Code).

Both these defects in the law emphasize the basic fact that property in the English law of sale of goods is required to perform too many functions. It is interesting that American law and the Canadian reform proposals have moved away from this to a more functional approach. Specific rules are adopted in relation to insurable interest, risk, insolvency, rejection, price and other questions which in English law are tied to property. (See M G Bridge & F H Buckley *Sales and Sales Financing in Canada* p 321.)

Company Law

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Introduction

1982 was something of a bumper year for the reporting of cases on company law. Undoubtedly the case which caught the headlines was the Court of Appeal judgment in *Prudential Assurance Co Ltd (No 2) v Newman Industries Ltd* [1982] 1 All ER 354. However, it is to be doubted if this case when viewed through the eyes of history will be seen to have made a lasting contribution. Of greater significance are the cases dealing with the difficult and messy relationship between corporate capacity, director's powers and the abusive use of such powers. From a practical point of view, undoubtedly the most important case is *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938 dealing with a receiver's duty of care and the important implication of the case that interference by a secured creditor with the receiver's realisation of the security could render the receiver the creditor's agent.

1 Ultra vires: director's powers: improper purposes

In *Re Lee, Behrens & Co Ltd* [1932] 2 Ch 46, [1932] All ER Rep 889 Eve J propounded the following test to determine the validity of the exercise by directors of an implied power to pay a pension to the widow of an ex-director (at 51–52, at 890–891):

> '. . . the validity of such grants is to be tested, as is shown in all the authorities, by answers to three pertinent questions: (i) Is the transaction reasonably incidental to the carrying on of the company's business? (ii) Is it a bona fide transaction? and (iii) Is it done for the benefit and to promote the prosperity of the company?'

This principle has been much criticised for confusing issues of corporate capacity with those relating to the propriety of the exercise of director's powers. Three recently reported decisions *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 (Oliver J), *Re Horsley & Weight Ltd* [1982] 3 All ER 1045 (CA), *Rolled Steel Products (Holdings) Ltd v British Steel Corpn* [1982] 3 All ER 1057 (Vinelott J) have done much to clarify this corner of the law and disentangle the confusion caused by *Re Lee, Behrens & Co Ltd*. For convenience sake these three cases will be dealt with en block as they overlap and, on the whole, are directed towards the same issue. These cases provide rich pickings for the student of company law and only their most salient aspects can be dealt with here.

(a) Whether a company has the capacity to enter into a transaction depends on the construction of its objects clauses. The test put forward by Eve J is simply 'not relevant to the exercise of a power expressly made an independent object on a proper construction of the memorandum' (*Re Horsley & Weight Ltd* at 1055 g: see also *Rolled Steel*

Products at 175 h). Thus in *Re Horsley & Weight Ltd* the issue before the Court of Appeal was whether the payment of a pension to an ex-director was a transaction the company could validly enter into. The court answered this question in the affirmative: the company's objects clause expressly authorised the payment of pensions and the liquidator's argument, that the payment of the pension to an ex-director was ultra vires because it was not made for the benefit of the company, was rejected. Where, of course, the transaction is not authorised by the company's objects clause it will be ultra vires, (this is ultra vires in the 'narrow sense' as defined by Vinelott J in *Rolled Steel Products* at 1076–77), and is incapable of ratification.

(b) Whether a particular provision in a company's objects clause confers capacity on a company (ie constitutes an object) or is merely a power (ie a provision designed to enable a company to carry out its objects) is a matter of construction of the relevant provision. This it is submitted is always a question of construction and not one of law. Although Buckley LJ in *Re Horsely & Weight Ltd* referred to certain matters which 'are by their very nature incapable of standing as independent objects which can be pursued in isolation as the sole activity of the company' (at 1051 a—cf also *Re Introductions Ltd* [1970] Ch 199, [1969] 1 All ER 887), he must have been referring to the normal construction of certain standard form provisions, eg a provision authorising the borrowing of money or the promotion and advertising of the company's goods. But there is nothing immutable in this categorisation, as he recognised (at 1052 e) when he conceded that companies incorporated for philanthropic purposes could part with their assets gratuitously. The position was best put by Vinelott J in *Rolled Steel Products* (at 1075 h):

> 'The question whether a stated "object" is truly an independent object or purpose is always a question of construction. Even borrowing or lending moneys are activities capable of being pursued as independent objects, for instance, in the case of a bank or finance company'.

(c) The courts will imply a power where this is necessary to enable a company to pursue its express objects but 'ex hypothesi an implied power can only legitimately be used in a way which is ancillary or incidental to the pursuit of an authorised object of the company' (*Re Horsley & Weight Ltd* at 1051 c).

(d) The second two limbs of Eve J's test in *Re Lee, Behrens & Co Ltd* (bona fide and benefit to the company) have also no application when determining whether a transaction is within a company's express powers (*Charterbridge Corpn Ltd v Lloyd's Bank Ltd* [1969] 2 All ER 1185, [1970] Ch 62, *Re Horsley & Weight Ltd*). As Oliver J pointed out in *Re Halt Garage (1964) Ltd*, there are certain matters, such as the declaration of dividends, with respect to which it is impossible to apply the test of benefit to the company, particularly if the test of benefit to the company is that put forward by Plowman J in *Parke v Daily News Ltd* [1962] 2 All ER 929, [1962] Ch 927, 'the benefit of the shareholders as a whole'.

(e) As regards implied powers, only Vinelott J in *Rolled Steel Products* made it clear that the second two limbs of Eve J's principle was also

inapplicable, although the tenor of the other judgments clearly support this proposition. For Vinelott J, the phrase ultra vires was used 'in a wider sense' to describe cases where a power 'express or implied' was exercised for a purpose which the company is not authorised to pursue by its memorandum of association but that these cases were more properly classified as dealing with an abuse of power rather than its existence. In the telling phrase of Oliver J in *Re Halt Garage (1964) Ltd* (at 1030 a), it does not follow that 'because a power must not be abused, therefore, beyond the limit of propriety it does not exist'.

(f) There still may be one rather exceptional situation where the issue of benefit to the company is relevant to the issue of ultra vires (in Vinelott J's narrow sense), or the existence of a power, and that is where a company's 'memorandum of association expressly or by implication provides that an express object only extends to acts which benefit or promote the prosperity of the company, then regard must be paid to that limitation' (*Re Horsley & Weight Ltd* at 1054 a per Buckley LJ).

(g) There are important reasons for keeping the issue of capacity, or the existence and scope of a power, conceptually distinct from that relating to the abusive exercise of a power. As Vinelott J pointed out in *Rolled Steel Products* (at 1077), transactions involving an abuse of power may 'confer rights on a third party who can show that he dealt with the company in good faith', whereas this is not possible where a particular transaction is simply an unauthorised one for the company to enter into. In *Rolled Steel Products* Vinelott J held that the defendants could not enforce a guarantee against the plaintiff company, despite the fact that plaintiff company's objects clause contained a provision authorising it to give guarantees, because the defendants knew that the overall purpose of the transaction was not to promote the interests of the plaintiff but for the benefit of another company controlled by its principal shareholder (at 1082 h). Where a third party is ignorant of the improper purposes underlying the transaction then, provided the transaction is one which the company could enter into, it is enforceable. This, it is submitted, is true even where the third party has given no consideration (eg a widow of an ex-employee obtaining a pension), provided the transaction is one the company can enter into (cf *Rolled Steel Products* at 1077 d). As Buckley LJ stated with respect to the pension the validity of which was questioned in *Re Horsley & Weight Ltd*: 'The provision of the pension was within the terms of the clause [in the company's objects], and consequently it was, in my judgment, intra vires the company' (at 1054 b).

(h) In deciding on the validity of a particular transaction, the court has not only to determine whether the company has capacity to enter into it, but also exactly what type of transaction the company has entered into. In other words, the court must classify the transaction as an essential step in determining its validity. There is a difference between genuine payments of remuneration and remuneration which is nothing more than dressed-up dividends out of capital (see *Ridge Securities Ltd v IRC* [1964] 1 All ER 175). This was the issue before Oliver J in *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 where he decided that payments to the director in that case could not be classified as remuneration (as

they had been labelled by the company) but were in fact gratuitous payments, the director because of illness having ceased to play an active part in the affairs of the company. The court can determine for itself the nature of the transaction and it is not a 'slave to whatever form of words the members may have chosen to use in the resolution which they pass' (at 1043 c–d). It was on this basis that *Re W M Roith Ltd* [1967] 1 All ER 427 was held to have been decided: the transaction in that case 'was a sham transaction for the purpose of conferring a gratuity on the principal shareholder's widow' (*Re Halt Garage (1964) Ltd* at 1032 f, *Re Horsley & Weight Ltd* at 1053 e).

(i) There was some discussion of whether a power exercised for an improper purpose was ratifiable and this important topic can only be touched upon here. Vinelott J considered that such an exercise was never ratifiable even by all shareholders acting unanimously (*Rolled Steel Products* at 1083). This absolutist position is, however, questionable. If there is no prejudice to creditors it is difficult to see why such an exercise of power cannot be ratified by *all* the shareholders so as to make it immune to any challenge from the liquidator (*Re Horsley and Weight Ltd* at 1055 d, *Re Halt Garage (1964) Ltd* at 1036 h). Also, *Hogg v Cramphorn Ltd* [1967] Ch 254, [1966] 3 All ER 420 indicates that certain exercises of a power for a collateral purpose can be ratified. Where there is less than unanimity then the minority shareholders can have the vote set aside on the grounds of fraud or oppression (*Re Halt Garage (1964) Ltd* at 1036–1037).

2 Ultra vires: section 9(i) of the European Communities Act 1972

The judgment of Lawson J in *International Sales and Agencies Ltd v Marcus* [1982] 3 All ER 551 is the first reported case on s 9(1) of the European Communities Act 1972 and, although it answers some of the problems raised by that subsection, it does little to dispel the criticisms of this unhappy exercise in law reform. The facts in *Marcus* were as follows. The second defendant made a loan to the late Mr Fancy (F), who during his life was the dominant director of the plaintiff company. On F's death insolvent, a Mr Mumsey, who assumed control of the plaintiff company, arranged for it to pay off the loan made to F by the second defendant. The repayment transaction was handled by the first defendant (Marcus), a director of the second defendant. When these facts were discovered the plaintiff company commenced an action to recover the money.

Lawson J had no doubt that the payment of F's debt by the plaintiff company was clearly ultra vires as it was simply a gift (which he referred to as a 'hand-out') not authorised by the company's objects clause. The plaintiff company had a standard form objects clause empowering it to draw cheques and counsel for the defendant had argued that this validated the payment as

> 'in considering the question of ultra vires the court is not concerned with the *nature* of any transactions in question, but merely to enquire whether the form in which it is clothed (for example, the drawing and the issue of cheques) is one covered by the objects clause' (at 557 b).

This over subtle argument (at least as regards payments of money) was, rightly it is submitted, rejected by Lawson J. The payment of money is not an independent legal transaction but must be related to something else, and it is this something else which will determine the validity of the transaction. Of course, where the transaction is intra vires, but entered into for a questionable purpose, different issues arise and these have already been dealt with. Lawson J had also no doubt that the making of the payments was a breach of Mr Mumsey's fiduciary duty as director and that the first defendant had actually knowledge of the breach and therefore was liable as a constructive trustee. This should have ended the matter, but an amended defence was entered that the defendants were protected by s 9(1) of the European Communities Act 1972 and, in dealing with this issue, Lawson J made a number of observations of considerable importance on the scope of the subsection.

(a) Lawson J did not consider that s 9(1) at all affected the 'principles of constructive trust in relation to the recipients of companies' moneys knowingly paid in breach of trust' (at 559 h). There are a number of reasons for this. First, as Lawson J points out, the constructive trust applies to a much wider range of situations than those involving merely an element of ultra vires. Secondly, and perhaps more importantly, ultra vires deals with the issue of security of transactions whereas constructive trust deals with the extent to which a third party should be affected by a breach of duty by a fiduciary. There is, however, some interrelationship between s 9(1) and constructive trust principles as, where the facts justify the application of a constuctive trust doctrine, it would be difficult for a party to assert that he was acting in good faith within s 9(1).

(b) On the assumption that he might be wrong on the constructive trust point, Lawson J went on to deal with other issues relating to the application of s 9(1) to the facts in *Marcus*. He held that the facts in the case did not involve any element of 'dealing' between the plaintiff company and defendants, but that whatever dealing took place was between Mr Mumsey and the defendants. Lawson J did not therefore have to grapple with the vexed question of whether gratuitous payments could constitute dealing, a question which remains open. This issued was raised by Oliver J in *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016, at pp 1039–40, but not disposed of.

(c) Although the plaintiff company had more than one director, its affairs were dominated by a single director. Nevertheless, in these circumstances, Lawson J considered the transaction to have been decided upon by the directors within the meaning of s 9(1) as the dominant director 'was the sole effective director to whom all actual authority to act for the companies was effectively delegated' (560 e–f). This is an important interpretation and one which is essential if the section is to operate to protect outsiders when dealing with the dominant figure in a company's management. It is also the interpretation which is most faithful to the spirit of the Second Directive which Lawson J considered he was 'entitled to look at . . . as an aid to the interpretation of s 9(1) Act' (at 559 f).

(d) There was no doubt that the defendants did not satisfy the good faith requirement of s 9(1) as they had actual knowledge that the transaction

was beyond the company's capacity. But Lawson J was willing to find that a person would not be acting in good faith where in all the circumstances of the case he could not reasonably have been unaware of the ultra vires nature of the transaction. The absence of good faith, which had to be proved by the company (at 560), involved some element of 'turning a blind eye' (at 559 f–g).

The last point involved the question of the remedy. Counsel for the plaintiff conceded that a tracing remedy was not appropriate but claimed to be able to recover the money as money had and received. Lawson J granted this remedy and would have been willing to do so even if the claims against the defendants were based merely on receipt (at 560 j). This, for the reasons set out in Goff and Jones, *The Law of Restitution* (2nd edn, 1978) pp 363–364, will normally be the most appropriate remedy as proprietary remedies can operate to prejudice unfairly the defendant's creditors. But where there is a constuctive trust which takes the form of a knowing receipt of the beneficiary's property (as opposed to knowing participation in a breach of duty) then sometimes a restitutionary proprietary remedy is appropriate. In this situation the defendant is being compelled to give back what he has improperly received and not merely pay compensation for intermeddling with the beneficiary's property.

3 Receiver: duty of care to guarantors

Standard Chartered Bank Ltd v Walker [1982] 3 All ER 938 is an extremely important decision on the duty of care owed by a receiver to the guarantor of a company's debt. Not only is this an issue of great practical importance, but it also has a direct bearing on the nature of the proprietary interest which is created by way of security. The Walkers guaranteed the overdraft of a company (which they controlled) with the plaintiff bank, the overdraft being also secured by a fixed and floating charge over the company's assets. A receiver was appointed to sell off the company's assets. The sale did not realise sufficient to satisfy the bank's debt and, when the bank attempted to enforce the guarantee by means of Ord 14 proceedings, it was met by the defence that the auction disposing of the company's assets had been conducted negligently and that this negligence had caused compensable loss to the Walkers as guarantors of the company's debt.

The first question before the court was whether a receiver owed a duty of care to the guarantor of the debt. Lord Denning MR had no doubt that he did, relying on *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 All ER 633, [1971] Ch 949 and more generally the neighbourhood principle in tort: the receiver

> 'owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagor so as to reduce the balance owing as much as possible, and also to the guarantor so that he is made liable for as little as possible on the guarantee' (at 942 e).

In this the Master of the Rolls was explicitly supported by Fox LJ and implicitly by Watkins LJ. In reaching this conclusion both Lord Denning MR and Fox LJ held that in so far as *Barclays Bank Ltd v Thienel* (1978) 247 EG 385 and *Latchford v Beirne* [1981] 3 All ER 765 suggested the contrary, they could

not be supported. In formulating the content of this duty of care Lord Denning MR was willing to find that it related not only to the manner of the receiver's realisation of the security but also that it 'is at least arguable that in choosing the time, he must exercise a reasonable degree of care' (at 942 f). In this he was not supported by Fox LJ, whose judgment implies that counsel for the guarantors conceded that a mortgagee is free to select his own time of sale. The position of Fox LJ is supported by law, both old and new (*Warner v Jacob* (1880) 20 Ch D 220; *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 All ER 633 at p 643, [1971] Ch 949 at p 965), and it is submitted by principle. It would put the security holder in an impossible position if he were to be constrained in the timing of the sale. A security is taken to protect the security holder's interests, and a debtor runs the risk that enforcement which benefits the security holder may not be always optimum from his point of view. If a debtor considers the timing of the sale inopportune, and it probably will be in a better position to judge this than the receiver, then it can take steps to arrange for financing to satisfy the receiver so that the sale can be delayed or postponed.

The second point of importance in *Walker* was the liability of the bank for the acts of the receiver. The debenture was in usual form, making the receiver the agent of the company: an agency relationship which is curious and 'logically untidy' (*Sowman v David Samuel Trust Ltd* [1978] 1 All ER 616 at p 622) given that the receiver's principle role is to protect the interests of the security holder. It was argued that the bank had so interfered with the receiver in the conduct of the realisation that the receiver had become the bank's agent, and the bank was therefore answerable for any negligence on the part of the receiver. The court accepted this argument: as a matter of principle interference by the charge holder in the conduct of the realisation could make the receiver the charge holder's agent rather than that of the company. In *Walker* the court did not consider that it had sufficient facts to determine whether there had been the degree of interference which would give rise to an agency relationship. This is a very significant development and a reminder to those who appoint receivers of the perils of interference. This postulating of a possible agency relationship between a receiver and the charge holder is, however, completely in keeping with the receiver's principle function as 'the receiver's contemplated position as agent of the mortgagor must be regarded as not of the essence of his position and status as a receiver' (*Re Northern Garage Ltd* [1946] 1 All ER 566 at pp 568–69, [1946] Ch 188 at pp 191–192).

4 Receiver: acknowledgement of debt

Re Overmark Smith Warden Ltd [1982] 3 All ER 513 contains a number of observations on status of a receiver's report prepared pursuant to s 372(1)(b) and s 373 of the Companies Act 1948 as an acknowledgement of a claim for the purpose of the Limitation Act 1939 (as amended). The observations of Slade J were obiter as he held that, even if they were an acknowledgement, the acknowledgement itself took place outside the limitation period. But it is clear from his judgment that he was sympathetic to the idea that the receiver's report could constitute an acknowledgement (cf *Re Gee & Co (Woolwich) Ltd* [1974] 1 All ER 1149, [1975] Ch 52).

5 Date of crystallisation of floating charge: preferential creditors

It is a truism that the date on which a floating charge crystallises is of critical importance with respect to a wide range of issues. One of these issues relates to the operation of ss 94 and 319 of the Companies Act 1948, which give priority to the claims of preferential creditors over those of floating charge holders. If a floating charge can be made to crystallise before either of these sections becomes operative, the charge holder will not be deferred to the claims of the preferential creditors as this charge will be fixed (*Stein v Saywell* [1969] ALR 481). This is a potential loophole in the coverage of ss 94 and 319, as also arguably is the situation where there is a hiatus between the appointment of a receiver and the company's winding up. Any preferential claims incurred during this period do not enjoy priority over the claims of the holders of the crystallised floating charge. This, among other things, was one of the issues in *Re Christonette International Ltd* [1982] 3 All ER 225.

The sequence of events in *Re Christonette International Ltd* was as follows: (1) on 13 December 1978, a creditor's petition for a compulsory winding-up order was presented; (2) on 19 January 1979, a receiver and manager under a validly created floating charge was appointed; (3) on 22 January 1979, an order was made for the compulsory winding up of the company. The liquidator, without court authorisation, commenced an action to set aside the debenture but was unsuccessful. The question before the court was whether the property subject to the floating charge (which of course had crystallised on the appointment of the receiver on 19 January 1979) had, pursuant to s 319(6) of the Companies Act 1948, first to be applied in satisfying the liquidator's costs in the unsuccessful action challenging the debenture. Vinelott J held that it did not.

In reaching his conclusion, Vinelott J, considered it essential to distinguish between a floating charge which had not crystallised at the time the winding-up order is made and one which had been transformed into a fixed charge by a crystallising event before this date. With respect to the former, the assets covered by the charge had to be treated as 'assets' within s 319(6) out of which the costs of winding up could be met. There was authority supporting this (*Re Barleycorn Enterprises Ltd* [1970] 2 All ER 155, [1970] Ch 465) and such an interpretation was necessary in order to ensure that the priority rules established by s 319 operated coherently: costs of winding up have priority to preferential creditor claims (s 319(6))—preferential creditor claims are given priority over the claims of floating charge holders—therefore the liquidator's costs must also have priority over the claims of floating charge holders as any other solution would produce a logically absurd circularity problem. Where, however, a charge crystallises before the making of the winding-up order there is no need for this solution as the preferential creditors in the winding up would have no claim to the charged assets because they are no longer the company's assets (*Re Griffin Hotel Ltd* [1940] 4 All ER 324, [1941] Ch 129; *Sowman v David Samuel Trusts Ltd* [1978] 1 All ER 616) and therefore not available to meet the claims of the preferential creditors (cf Companies Act 1948, s 94).

An alternative argument put forward by the counsel for the liquidator was that the winding-up order related back to the presentation of the petition and therefore when the receiver was appointed the company was not one which

was 'not in the course of being wound up' within s 94(1). Vinelott J rejected this on the grounds that the

> 'words "in the course of being would up" describe the situation of a company after an order for its compulsory winding up has been made or a resolution for the winding up of the company and the appointment of a liquidator has been passed' (at 231 f).

6 Charges: out of time registrations

In *Victoria Housing Estates Ltd v Ashpurton Estates Ltd* [1982] 3 All ER 665 the court had to deal with an important issue involving the exercise of its descretion under s 101 of the Companies Act 1948 to extend the time for registration of a charge. The facts were as follows. On 15 May notice was given summoning a meeting of the defendant company (Ashpurton) for 23 June to consider a resolution to wind up the company. On 4 June the plaintiff (Victoria) commenced proceedings under s 101 of the Companies Act 1948 for permission to register out of time a charge against the defendant company. The application came before the registrar on 11 June. The registrar refused to register the charge principally because the s 101 application was made when Ashpurton was insolvent and its winding up imminent. The present appeal was from the decision of a deputy High Court judge upholding the registrar's decision. The Court of Appeal, relying on one of its own unreported decisions which was only reported in conjunction with the *Victoria Housing Estates* case (*Re Resinoid and Mica Products Ltd* [1982] 3 All ER 677 (note)), held that the 'imminence of liquidation is a relevant factor' in the exercise of the court's discretion under s 101 and upheld the registrar's refusal to extend the time for the registration of the plaintiff's charge. Before looking at this aspect of the decision, a number of other points need to be made.

(a) The court confirmed that the partial invalidity created by s 95 of the Companies Act 1948 against 'any creditor of the company' for failure to register a charge as required by that section only referred to a creditor who had acquired a proprietary interest against a company (at 667 g, *Re Ehrmann Bros Ltd* [1906] 2 Ch 697). It also follows from this reasoning that the proviso normally inserted in an order under s 101 ('that this order be without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered') was intended 'to protect only rights acquired against, or affecting, the property comprised in the unregisterd charge' (at 670 j).

(b) Once a company had gone into liquidation, the court will almost invariably never make an order under s 101 with the usual proviso attached. At this point the unsecured creditors acquire a proprietary interest of sorts as they are 'in the nature of cestuis que trust with beneficial interests extending to all the company's property' (at 671 a), an interest which apparently arises as a corollary of the liquidator's obligation to distribute the company's assets pari passu among the unsecured creditors. This somewhat difficult idea of a beneficial interest arising because of an equitable obligation or duty imposed on another is one that has been influential in this area of the law (*Re Anglo-*

Oriental Carpet Manufacturing Co [1903] 1 Ch 914, *Re Argentum Reductions (UK) Ltd* [1975] 1 All ER 608) and is one whch is quite firmly established in the case of discretionary trusts (*Re Hay's Settlement Trusts* [1981] 3 All ER 786). The effect of recognising that unsecured creditors possess this type of interest makes a s 101 order containing the usual proviso a futile exercise.

(c) Whether the court makes an order under s 101 is ultimately a matter of discretion and not of law, and therefore exceptional circumstances may occur justifying the court extending the time for registration after a liquidation has commenced without the usual proviso being appended. Lord Brightman considered that this might be the case where there has been fraud (at 671 d), although care would have to be taken not to prejudice creditors who had acquired an interest but who were untainted by the fraud. There is nothing in s 101 requiring the proviso to operate in an all or nothing manner.

As was stated earlier, the Court of Appeal in *Victoria Housing* considered the imminence of liquidation, as opposed to the fact of liquidation, to be a factor relevant to the exercise of the court's discretion under s 101 and on the facts of the present case held that the registrar was justified in refusing to grant an extension of time. This is extremely solicitous of the interests of unsecured creditors who would have no standing to object if the charge holder had merely attempted to enforce the charge. What is important to note is that it is the imminence of liquidation at the time of the application for an extension which is important and not the solvency of the company. These two issues will inevitably be often interlinked. However, to make a company's solvency the relevant consideration would probably be impracticable given the nature of a s 101 application and, more importantly, it would give the unsecured creditors a measure of protection to which they are not entitled. The court left open the question of what is to happen where liquidation intervenes between an application to the registrar under s 101 and an appeal from his unjustified refusal to extend time for registration, the liquidation being unforeseen at the time of initial application. This should be a relatively rare occurrence, but where it does eventuate it is to be hoped that the extension of time will be granted. There is no justification for depriving a secured creditor of his security because of a judicial error and the unsecured creditors could scarecely argue that they have been prejudiced unfairly.

The court in *Victoria Housing* also considered that even had there been no winding up in that case, other facts would arguably have justified the registrar's refusal to permit an out of time registration. The plaintiff company, on discovering that the charge had not been registered, delayed seeking registration as it feared that an application under s 101 would precipitate the company's liquidation. Instead it sought to sell off the charged properties. The court took a dim view of this, and felt that a chargee should act swiftly to register the charge and not delay in order to see which way the wind is going to blow (at 677 c).

7 Transfer of shares: pre-emptive rights

Safeguard Industrial Investments Ltd v National Westminster Bank Ltd [1982] 1 All ER 449 is a case of considerable practical importance on the operation of

provisions in articles of association conferring on the members of a company a right of pre-emption to purchase the shares of any member wishing to sell his shares. Much simplified the facts in *Safeguard* were as follows. W, a shareholder in W Ltd, died and bequeathed his shares to X and Y. The defendant bank was appointed W's executor and when the administration of W's estate was complete, the bank regarded itself as holding the shares on trust for X and Y. The question arose as to whether this arrangement brought into operation a provision in the articles of W Ltd obliging any member who wished to transfer his shares to offer them proportionately to other members of the company. Vinelott J held that it did not and his decision was upheld by the Court of Appeal.

At the outset it is important to note that the bank was able to be registered as a member on the transmission of W's shares on his death. This was because (somewhat curiously) the pre-emptive right provisions in W Ltd's articles did not extend to transmissions but only applied to transfers. Had the articles not taken this somewhat curious form, the problem would not have arisen.

The principle argument put forward by the appellants, who were shareholders in W Ltd, that the arrangement in *Safeguard* triggered off the pre-emptive rights provisions in W Ltd's articles, was based on *Lyle & Scott Ltd v Scott's Trustees* [1959] 2 All ER 661, [1959] AC 763. Counsel for the appellant argued that the case had decided that

> 'members (of a company) who achieve a position in which, whether voluntarily or by operation of law, they hold the shares registered in their names as bare trustees for a non-member are deemed to be persons who are deemed to be desirous of transferring their shares even though the beneficiaries disclaim any desire to exercise their right to compel a transfer to them' (at 453 f).

Oliver LJ rejected this as a much too wide reading of *Lyle & Scott*. In that case the article referred to a shareholder 'desirous of transferring' his shares and what the court had before it was an unconditional agreement to sell which obliged the vendor-shareholders to transfer their shares when requested to do so by the purchaser. This element of agreement added a factor which was simply not present in *Safeguard* which involved a duty imposed by law to transfer if called upon to do so.

Counsel for the appellant also argued that the reference to the transfer of a share in the W Ltd's articles embraced 'any transaction or combination of circumstances producing the result that the whole beneficial interest previously vested in a member become vested in another person even though the legal title is not tranferred at all' (at 454 g). This also was rejected by the Court of Appeal. The word transfer comprehended the transfer of the legal interest, a view endorsed in *Hunter v Hunter* [1936] AC 222 (cf 1958 SC 230 at 250, [1959] 2 All ER 666 at 672, [1959] AC 765 at 785). The difficulties that counsel for the appellants argument would give rise to were more fully canvassed by Vinelott J at first instance ([1980] 3 All ER 849 at 858–9) and these were endorsed by the Court of Appeal. However, Oliver LJ did leave open the question of whether an 'uncompleted agreement to sell shares' (at 455 f) would constitute a member a proposing transferor. Where the putative transferee could obtain a specific performance order then it undoubtedly should (cf *Oughtred v IRC* [1960] AC 206, a case involving stamp duty considerations). These problems would be greatly minimised if the pre-

emptive rights provision were drafted in terms of a 'desire to transfer' as in the *Lyle & Scott* case. This would make the matter turn on the question of whether the owner had 'sufficiently evinced a desire to transfer the legal interest in the share' (per Vinelott J [1980] 3 All ER 849 at p 859), something which is a relatively straightforward question of fact.

The third argument of the appellant, that the testator by making his will had evinced the necessary intention to make a transfer, was dismissed by the court. It was simply not permissible to attribute the testator's desire to transfer his shares to his personal representatives. Such an attribution would lead to anomalies particularly where a shareholder died intestate.

The outcome in *Safeguard* in all probability frustrated the draftsman's purpose in inserting the pre-emption provisions in the company's articles. However, the issue is essentially one of drafting and the draftsman can with relative ease devise a form of words to operate where shares are transmitted on death or the owner transfers the beneficial interest.

8 Shares: lien in favour of company

The decision of Walton J in *Champagne Perrier-Jouet SA v H H Finch Ltd* [1982] 3 All ER 713 involved technical, but important, issues on the nature and priority of a lien created by a company's articles of association over shares of a member with respect to that member's liability to the company. L, a director of the defendant company (F Ltd), became indebted to it for goods supplied to him on credit by the company. The articles of F Ltd prohibited it from making any loan whatsoever on the security of its shares. The articles also gave the company a lien over the shares of any member indebted to it and, as is the case of most family companies, the articles required a shareholder who wished to transfer his shares to offer them to the other members. When L retired in 1976, the account evidencing his indebtedness to the company for goods supplied, entered in the company's books as a 'loan account', recorded a debit of £27,000 which L agreed to pay off in instalments. Subsequently, L created an equitable mortgage of his shares in F Ltd in favour of the plaintiffs. The issue before Walton J was relatively straightforward: which interest had priority, F Ltd's lien, or the plaintiffs' equitable mortgage which was subsequent in time?

The first question to which the court had to address itself was whether the arrangement between L and F Ltd constituted a loan and therefore prohibited by s 190 of the Companies Act 1948 (see now Companies Act 1980, ss 49–53, 66). Walton J held that the arrangement did not constitute a loan, relying to some extent on *Potts Exors v IRC* [1951] 1 All ER 76, [1951] AC 443 and on the dictionary definition of loan which requires a sum of money to be lent and not merely the extension of credit for goods supplied. As has been pointed out ((1982) 3 Co Law 219), the *Potts Exors* case in actual fact contains dicta which is contrary to Walton J's position. However, as a matter of principle a credit sale is not a loan, and the matter is now to a large extent dealt with by the Companies Act 1980 which treats the type of transaction in *Champagne Perrier* as a 'credit transaction' (s 65(3)) and prohibits them in the case of public companies (s 49(2), s 65(1)).

Having decided that the arrangement was not a prohibited loan, the priority contest between the company's lien and the plaintiffs' equitable

mortgage was relatively easy to resolve. The lien, being an equitable charge which had already arisen, took priority over subsequent equitable interests including that of the plaintiffs (*Bradford Banking Co Ltd v Briggs, Son & Co Ltd* (1886) 12 App Cas 29).

Lastly, the court had to determine whether the company in selling the shares covered by the lien was subject to the pre-emptive rights provision of its articles of association. Walton J had little difficulty in finding that the company was so bound; and given the wording of the relevant articles and of the Companies Act 1948, s 20, his conclusion seems inevitable.

One other point of interest was touched upon by Walton J in *Champagne Perrier*. This related to the question of whether the mortgagee of a block of property (such as shares) is obliged to sell the property as a block or whether it is permissible to sell only part even though the pro rata price for the part is below that obtainable had the parcel been sold en bloc. Walton J considered that at least as regards chattels the mortgagee must not sell part of the charged assets if this would substantially destroy the value of what remains; for example, selling only part of a set of Chippendale chairs (at 725 f). In light of the *Standard Chartered Bank* case this seems an inevitable constraint on a mortgagee's power of sale. Walton J considered that the Law of Property Act 1925, s 101(1), obviously envisages that a mortgagee is free to sell real property piecemeal. But even here there is no reason why this power of sale should not be subject to *Standard Chartered Bank* so that the negligent sale of only part of the charged property which reduces the value of what remains could give rise to liability.

9 Auditor: qualifications

It is an offence for a person who is a director or secretary of a company to act also as its auditor (Companies Act 1948, s 161(2), Companies Act 1976, s 13). In *Secretary of State for Trade and Industry v Hart* [1982] 1 All ER 817 the respondent had acted as an auditor of a company even though he was its secretary and director. The court was faced with the question of whether he had committed an offence in light of his defence, accepted by the lower court, that he was ignorant of the law disqualifying him from acting as the company's auditor. The court held that ignorance of the law was a good defence as this was the most plausible interpretation of sub-ss (5) and (6) of s 13 of the Companies Act 1976 which created the offence of acting as auditor when knowingly disqualified.

10 Director: remuneration

The decision of Oliver J in *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 contains a number of important observations on the question of director's remuneration. As has already been pointed out, Oliver J considered it proper for the court to determine whether what was paid by the company was remuneration and not a sham transaction making an improper return of capital to the shareholders. However, this assessment will be far from easy. Directors are entitled to a 'reward' which is 'attributable to the mere holding of the office of director' (at 1042 h). Because remuneration can be based on status rather than service, it will be impossible in many cases to test the

arrangement by assessing whether the company has received a quid pro quo for its payment. Also, in the case of private companies which are profitable, director's remuneration for good reasons may 'bear very little relation to the true market value of the services rendered by the directors' (at 1033 e). Oliver J thought there was nothing inherently wrong in this, at least provided there were no complaining minority shareholders. Even where a company has not been profitable, remuneration is not necessarily prohibited as this may be the very case where substantial remuneration is justified (at 1043 e). However, the payment of remuneration in this situation may constitute misfeasance and is not ratifiable at least with respect to an action under s 333 of the Companies Act 1948. This was the view of Templeman LJ in *Re Horsley & Weight Ltd* [1982] 3 All ER 1045 at p 1056 with respect to the payment of a pension to an ex-director and by parity of reasoning the same principle should apply to director's remuneration.

Whether or not the payment constitutes remuneration is a question of fact to be decided by the judge. Oliver J held in *Re Halt Garage (1964) Ltd* that the remuneration was not genuine remuneration but a gift. However, the company had power to remunerate its directors and Oliver J held that a portion of the payment constituted remuneration which the liquidator could not recover. Whilst this somewhat novel apportionment no doubt achieved justice, it is important to note that there was no intention to defraud. It is to be doubted if the benign attitude of the court in *Re Halt Garage (1964) Ltd* could be extended to the fraudulent ([1982] 3 All ER, at 1044 h).

11 Derivative actions

The marathon litigation in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 fizzled out in a rather anticlimactic judgment of the Court of Appeal. The court held that Vinelott J erred in finding the directors of Newman guilty of fraud on most of the counts and anyhow, as Newman through an independent board stated that it would accept the benefit of any order made in its favour, this ended the matter as far as the *Foss v Harbottle* (1843) 2 Hare 461 issue was concerned. There were, however, a number of observations on *Foss v Harbottle* but these scarcely do justice to Vinelott J's imaginative judgment.

First, the Court of Appeal considered that Vinelott J was wrong not to take the *Foss v Harbottle* point as a preliminary issue rather than deciding it after the action had been tried for by 'the time a derivative action is concluded, the rule in *Foss v Harbottle* can have little, if any, role to play' (at 365 g). Where, however, a plaintiff alleges fraud, the court will be faced with a dilemma (at 364). If the court must assume that every allegation in the statement of claim is true, a plaintiff will be able to 'outmanoeuvre' the rule in *Foss v Harbottle* (at 364 f). On the other hand, if a plaintiff must 'prove fraud and control before he can establish his title to prosecute his action' (at 364 g) then again the rule of *Foss v Harbottle* is outflanked. To resolve this dilemma, the court considered that a plaintiff must at least establish a prima facie case that he is entitled to bring the action, and that the facts alleged as to 'fraud' and 'control' are not to be assumed as on the trial of a preliminary point of law (at 366 a–c).

Second, there is general agreement that Vinelott J's treatment of the issue of 'control' was both imaginative and particularly appropriate when dealing

with large public companies with respect to which control is far from easy to locate. The Court of Appeal had only a few perfunctory remarks on this issue which are far from clear as to the direction in which they are pointing. The court recognised that control could arise because of apathy or influence and this favours Vinelott J's position (at 364 e–f). Also, the court favoured leaving the decision to bring an action to an independent board and even perhaps a specially summoned shareholders' meeting (at 365–366). From this the inference can be drawn that the objection by an independent board would be fatal to the plaintiff's action which at least evinces a more sophisticated approach to the issue of control than one which insists on proof of de iure control.

Third, the court rejected the 'interests of justice' exception to the rule in *Foss v Harbottle*, an exception which has flourished more at the level of judicial rhetoric than as the basis of specific judgments. The Court of Appeal considered it too diffuse to be given operational content. (See also *Eastmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437 at p 444).

Fourth, the court distinguished between the *Foss v Harbottle* 'when it is sought to stay proceedings *in limine* and its application when nothing remains but to enforce a judgment in a derivative action which has been permitted to proceed' (at 363 c). This is a novel distinction, not previously clearly articulated in the cases, and it entails that *Foss v Harbottle* is not a principle going to jurisdiction but a procedural objection to be raised by the parties (cf *Heyting v Dupont* [1964] 2 All ER 273).

Lastly, the court made some important observations designed to prevent shareholders transmitting what is a claim relating to a wrong to the company (a derivative claim) into a personal action so as to circumvent the rule in *Foss v Harbottle*. Where a shareholder's loss is merely a reflection of a loss to the company, this cannot constitute the basis of a separate personal action. To permit such an action would provide a much too easily available ploy for circumventing the rule in *Foss v Harbottle* and would also give rise to problems of double recovery (at 366–367). Before a shareholder can bring a personal action, he must show a loss 'which is separate and distinct from the loss to the company' (at 367 c).

The whole spirit of Court of Appeal judgment in *Prudential (No 2)* is one of profound orthodoxy. The rule in *Foss v Harbottle* is not 'merely a tiresome legal obstacle' but is fundamental to company law, designed to prevent shareholder harassment and to preserve the rights of the majority. No doubt the marathon litigation could be used to support the sound sense of the rule. However, another view is possible and, that is, that it is the rule's uncertainty and conceptual obscurity which causes the problems. If this is so, the Court of Appeal has not done a great deal to light the way.

The rule in *Foss v Harbottle* also came before Megarry V-C in *Eastmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437, the facts of which were somewhat out of the ordinary. The GLC formed the plaintiff company, which it controlled, and to which it agreed to lease a block of flats. The company was to sell individual flats to the public by way of long lease and the tenants would eventually become shareholders in the plaintiff company and control it. The GLC, after a change of policy, refused to implement further its agreement with the plaintiff company. The plaintiff company commenced proceedings to enforce the agreement but a shareholders' meet-

ing resolved to discontinue the action, the vote being carried by shares controlled by the GLC. A shareholder in the comany (to whom one of the flats had been sold) sought to take the action over.

The action by the shareholder was, as Megarry V-C pointed out, 'derivative' in nature (at 443 d). It was argued, however, that the alleged wrong in *Eastmanco* did not fall within the 'fraud' exception to the rule in *Foss v Harbottle* so as to permit the plaintiff to sue in the company's name. Megarry V-C rejected this argument. Fraud was to be given a wide equitable meaning. Here the shareholders' vote to discontinue the action stultified the major purpose for which the company was formed (at 445 h) and conferred on the majority shareholders an advantage denied the minority. He relied on *Daniels v Daniels* [1978] 2 All ER 89, [1978] Ch 406 and, while appreciating that it was a case dealing with directors, Megarry V-C, rightly it is submitted, considered that the directors in that case could not have condoned what they did by using their votes as shareholders to approve of the transaction. Perhaps a more appropriate line of cases (to which *Daniels v Daniels* bears a family resemblance) would have been *Cook v Deeks* [1916] 1 AC 554 and *Menier v Hooper's Telegraph Works* (1874) 9 Ch App 350. These do not appear to have been cited to the judge, but they are authority for the proposition that shareholders cannot abandon corporate assets by a self-interested vote.

12 Winding up: fraudulent preference

The sequence of events in *Re F P & C H Matthews Ltd* [1982] 1 All ER 338 was relatively straightforward. The directors of a small family company guaranteed the company's indebtedness with its bank and also gave the bank a charge over their home by way of security. Because of the company's financial difficulties, it was decided on 2 November 1976 that the company should stop trading. At this point the company's overdraft stood at £10,702. The next day, 3 November 1976, the company received two cheques totaling approximately £18,000 which were used to clear its overdraft. The company actually stopped trading on 5 November and its loan account was cleared on 15 November by a transfer from its current account. The company eventually ended up in a creditors' voluntary winding up with a deficiency as regards unsecured creditors of £130,000. In reviewing the facts, the trial judge made the important findings that when the cheques were paid into the company's account on 3 November there was no pressure from the bank to make the payment and, in making the payment, the director intended to pay off the bank in preference to the company's other creditors at a time when the company was unable to pay its debts as they became due. It would also appear that the director when making the payments honestly believed that the company would be able to satisfy the claims of all of its creditors within six months. The liquidator successfully challenged the payment to the bank as being a fraudulent preference within the Companies Act 1948, s 320.

In determining whether a payment constitutes a fraudulent preference caught by s 320 of the Companies Act 1948, the important question is whether *at the time* it is made the debtor company intends to prefer the creditor. Where the company is to the knowledge of the directors insolvent at the time of payment then the 'only inference' (at 342 j) is that the payment was made with the intent to prefer. The belief of the directors that there

would be a reversal of the company's fortunes so that eventually it would be able to satisfy the claims of all its creditors was not a relevant consideration. This is because the relevant time for determining whether there had been a fraudulent preference is at the date of payment and hopes for the future were not relevant to this assessment. It also of course follows from this concentration on circumstances at the time of payment that if 'at the time when he makes the payment, [the debtor] genuinely believes that he can pay his debts as they fall due there can be no intention on his part to prefer' (at 343 f).

One other point of considerable practical importance was decided in *Re F P & C H Matthews Ltd*, and that is that interest is awardable under s 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 on the amount of the fraudulent preference. The money could be recovered as money had and received (*Marks v Feldman* (1870) LR 5 QB 275). This could work a hardship to creditors innocent of the fact that the payment of their debt constitutes a fraudulent preference. However, in this situation the court can exercise its discretion to deny interest. It refused to do so in the present case as the bank obviously used the money in the ordinary course of its business and turned it to its own pecuniary advantage.

13 Winding up: foreign currency debts

It was inevitable that a foreign currency creditor would attempt to use dicta in *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801, 814, 838, [1976] AC 443, 469, 498 to claim in a winding up that his debt should be converted into sterling on the date of its repayment to offset a decline in the value of sterling against other currencies between the date on which the winding-up proceedings commenced and that on which a dividend is paid out by the liquidator. This was the question dealt with by the Court of Appeal in *Re Lines Bros Ltd* [1982] 2 All ER 183, which involved a creditor's voluntary winding-up, although there was agreement that for the purpose of the question before the court (the date of the quantification of a foreign currency debt) 'there can be no reason for any distinction between a voluntary liquidation and a compulsory liquidation' (at 191 a).

The Court of Appeal considered that the proper date for converting a foreign currency debt was the commencement of the winding up. This was partly because of administrative convenience, but also because the principle of *Miliangos*, that foreign currency creditors should not bear the risk of a fall in the value of sterling, was not applicable to winding-up proceedings. Liquidation was a process for the collective enforcement of debts and, at least in the case of a company which is insolvent, the dispute would be between sterling creditors and foreign currency creditors. Where this is the case there is

> 'no particular reason, in the field of abstract justice, why the currency risk should be borne by one description of creditor rather than by another description of creditor when they all directed to rank pari passu' (at 191 j).

As the underlying rationale for the *Miliangos* principle was inapplicable, there was no good reason for departing from the general principle that the company's liabilities should be determined at the date on which the winding up commenced.

One small problem, however, remains with respect to this rule which at least has the virtue of simplicity. What if the company is solvent? Both Brightman and Oliver LJJ considered that the contractual claims remained alive and it was on this basis that *Miliangos* damages would be recoverable out of a surplus (cf *Warrant Finance Co's Case* (1869) LR 4 Ch App 643, 645, 647). However, any post-liquidation interest payable would have to be paid in full before such a claim could be entertained.

14 Winding up: advertisement of the petition

Rule 28 of the Companies (Winding-up) Rules 1949 requires, unless the court orders otherwise, every winding-up petition to be advertised in the London Gazette not less than seven clear days after it has been served on the company, and not less than seven clear days before the day fixed for the hearing. The purpose of this is to provide the company with an opportunity to discharge its debt or to dispute it before any damage is caused by the advertisement of the petition. Where this time scale has not been complied with the court has power to order the removal of the petition from the file. In *Re Signland Ltd* [1982] 2 All ER 609 Slade J held that the court would ordinarily strike out a petition where it was advertised before it had been served on the company as this constituted a 'serious abuse of the whole process of advertisement' (at 610). It appears, however, that where the advertisement occurs after the petition is served on the company but is premature, the court will not strike out the petition where no objection is taken by the company. The moral of *Re Signland Ltd* is simple: failure to comply with rule 28 could lead at the minimum to the embarrassment of having a winding-up petition struck out which, depending on the circumstances of the case, may have more serious consequences for the petitioner.

15 Winding up: stay of proceedings

In *Re J Burrows (Leeds) Ltd* [1982] 2 All ER 882 the issue before the court was whether it would exercise its discretion under s 307 of the Companies Act 1948 to stay proceedings commenced against a company which had placed itself into a creditors' voluntary winding up. The proceedings in this case being under the Social Security Act 1975 to recover social security contributions. In deciding whether to exercise its discretion to stay proceedings once a voluntary winding up has commenced, the court applies 'mutatis mutandis the same principles as it would apply . . . [in] a compulsory winding-up' (at 886 b, see also *Re Arco Co Ltd* [1980] 1 All ER 1067, [1980] Ch 196). This is to ensure that the principle of pari passu distribution of the company's assets is maintained. On the facts in the present case there was no such need to stay the proceedings as the Department of Health and Social Security was willing to give an assurance that it would not enforce any judgment against the company. Its primary reason for bringing the action was to be able to use any judgment against the company as a basis for proceeding against the directors who are liable by the 1975 Act for the company's default. This is a good example of a situation where the principle of a limited liability does not operate.

Consumer Law

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Introduction

1982 saw significant developments in the area of consumer law, but most were either statutory, eg the Supply of Goods and Services Act, or in the form of reports or discussion papers, eg the Office of Fair Trading paper on 'Home Improvements'. Nonetheless there have been some developments through the case law although not always to the benefit of consumers.

Weights and measures—Bennett v Markham [1982] 3 All ER 641

As readers who are familiar with the northern parts of England will be aware, the expectations of many a beer drinker differ from those which often obtain in more southerly climes. The typical Northerner tends not to favour a gassy substance, but prefers rather a somewhat flatter beer with a creamy head which follows the beer down the glass as it is drunk. Samuel Smith's brewery makes such a beer for sale in such establishments as the Nag's Head public house in Leeds, and the present writer can confirm that it is palatable. However there is no denying the fact that the Northerners' preference works also to the financial advantage of publicans when the beer is served from a 'free flow' (hand-operated), as opposed to metered, pump into a pint brim measure glass. One cannot get 20 fluid ounces (ie one pint) into such a glass and at the same time have a good creamy head. This can be done only with a larger pint line measure glass where liquid can be drawn up to the line, leaving room for the head on top. It was against this background that on 10 March 1981 a weights and measures inspector went along to the Nag's Head and ordered two pints of bitter which were duly served with a fine head into a pint brim measure glass. He did not object, but poured the contents rather into his graduated measuring vessels where each glass was found to contain only 18.25 fluid ounces of liquid. The question for the stipendiary magistrate and subsequently for the Divisional Court (Donaldson LJ and Webster J) was whether the licensee was thereby a person 'who, in selling or purporting to sell any goods by . . . measurement . . . delivers or causes to be delivered to the buyer a lesser quantity than that purported to be sold', contrary to s 24(1) of the Weights and Measures Act 1963.

In a sense this was quite a narrow question in as much as the answer was held to depend on whether it was within the expectation and understanding of customers that the foaming head formed part of the 'quantity' of the beer sold. The stipendiary held that it did since customers regarded it as a typical part of the pint and the practice was to top up with liquid if a particular customer objected. Moreover the head was not excessive or unreasonable on the facts. Accordingly he dismissed the informations and the Divisional Court held that he had been correct to do so. As a point of statutory interpretation the decision seems, with respect, to be sound. It also encour-

ages the use of hand-operated pumps (a good thing) but does little to promote the use of line measuring glasses (a bad thing). The difference in quantity when using a hand-operated pump can be considerable as a reference in the case to a survey carried out in West Yorkshire reveals. This suggests an average of 19.2 fluid ounces for brim glasses as against 21.4 fluid ounces for line measured glasses (see also Doxey (1983) 91 Monthly Review p 49). The overall lot of the consumer should be improved when s 19 of the Weights and Measures Act 1979 is brought into force, since this will require the foam to be disregarded when ascertaining the quantity of beer for the purposes of s 24. However one hopes that the new requirements will be met by an increased use of line measured glasses and not through a loss of the traditional head.

Bargain offers

Of all areas of English consumer law the provisions controlling misleading price claims and so-called 'bargain offers' would have few serious competitors if a prize were to be awarded for the most obscure body of law. Once it has been decided not to fall back on a broadly based offence proscribing the making of 'false or misleading statements' as to the price at which goods are being sold or services offered (cf the Australian Trade Practices Act 1974, s 53(e)), the complexity becomes in part a consequence of the subject matter which needs to distinguish between competitive pricing and that which is in need of detailed control. However there can be little doubt that English law is unnecessarily complex and it has indeed been the subject of recent reviews by the Office of Fair Trading (see the 'Review of the Price Marking (Bargain Offers) Orders 1979', October 1981) and more recently within the Department of Trade. It is to be hoped that this will result in a measure of simplification. Meanwhile some of the complexities can be illustrated by the case of *Westminster City Council v Ray Alan (Manshops) Ltd* [1982] 1 All ER 771.

The *Ray Alan* case was concerned with two separate incidents or series of incidents associated with a company with some 55 shops and a Leeds-based warehouse. One related to advertisements in the Daily Express and Evening Standard newspapers proclaiming, 'Thousands of Fantastic Reductions', including cotton casual sweaters at 75p each. Here the contention was that the alleged reduction was false in relation to the firm's Oxford Street shop and thereby an offence contrary to s 11(1)(b) of the Trade Descriptions Act 1968 which covers a person who makes a false comparison with his own earlier selling price for the same goods or goods of the same description. The effect of this provision is considerably reduced by the interpretation of the '28 days/six months' rule in *House of Holland Ltd v London Borough of Brent* [1971] 2 All ER 296 and by the fact that the assumptions embodied in that rule can be 'disclaimed' (see generally O'Keefe *The Law Relating to Trade Descriptions* paras 3[131] et seq). The present case adds a further nail to the coffin in as much as the Divisional Court accepted the respondent's contention that it was sufficient on the facts that a higher price had been charged in other shops at Rotherham (£1.50) and Leeds (£1.00). It was not necessary that it should have been charged in the same place or shop since such a requirement could not be read into the Act. Although this interpretation of a criminal statute is, in my view, justifiable it certainly does not advance the cause of consumer protec-

tion (presumably the result would be the same if, in the case of a large multiple chain, the higher price had been charged in one shop in a remote place). It should be noted that a similar latitude is not granted by Article 3 of the Price Marking (Bargain Offers) Order 1979 (SI 1979/364) where the higher price must have been charged 'on the same or on other identified premises'. However the Order, being made under the Prices Act 1974, has tighter time limits for prosecution.

A second incident related to a sign which had been displayed outside the Oxford Street shop on 20 November 1979, reading 'Closing Down Sale'. On 5 May 1981 the shop was still trading and it was the prosecution's contention that the earlier display of the sign constituted an offence against s 14 of the 1968 Act which covers false statements as to 'the nature of any services, accommodation or facilities provided in the course of any trade or business . . .'. Hitherto s 14 has been associated principally with the holiday trade (see eg *R v Sunair Holidays Ltd* [1973] 2 All ER 1233, but its application is much wider and it covers such services as dry-cleaning, travel, and services within the home improvement area. The submission of the prosecution in the present case was that the statement 'Closing Down Sale' related to the provision of a 'facility' within the meaning of s 14. Although the submission was ingenious, it nonetheless failed, the Divisional Court holding that the word 'facilities' should be construed *ejusdem generis* with 'services' and 'accommodation' and that it did not extend to shopping facilities without more. This seems, with respect, to be a surprisingly narrow approach to the scope of the section, being based essentially on the view that s 14 is concerned with 'services' rather than 'goods'. Yet it is clear that the section would have applied had it been falsely stated that a hotel had built-in 'shopping facilities' (see Stevenson (1982) 45 MLR 710, 712), and it has not hitherto been doubted that it is potentially applicable if (say) a mail order firm falsely states that its goods are available 'on approval' or 'carriage free' (see *MFI Warehouses Ltd v Nattrass* [1973] 1 All ER 762. Given the potentially misleading nature of false statements concerning 'Closing Down Sales', 'Discount Warehouses' and the like, no injustice would have been done in regarding s 14 as being potentially applicable to them.

Product liability in the law of tort

By a happy coincidence the fiftieth anniversary of *Donoghue v Stevenson* [1932] AC 562, HL was marked by the decision of the House of Lords in *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 210, HL), another appeal from the Scottish courts. The case is discussed in more detail by Professor Hepple in his article on Tort, but it is possible (if unlikely) that the decision will come to have a marked effect on the avenues of redress open to consumers. Hence the desirability of a relatively brief comment in this section.

One of the more curious (and frustrating) facets of product liability in the English law of tort has been the relative lack of judicial, as opposed to academic, discussion of the types of damage or loss which are in principle recoverable. Indeed once one leaves the familiar areas of death, personal injury and property damage many of the most elementary and fundamental questions have received scant attention, and such help as there is has come typically from cases involving defective property rather than products (see eg

Dutton v Bognor Regis UDC [1972] 1 All ER 462, CA, *Anns v Merton London Borough* [1977] 2 All ER 492, HL; for cases involving products see *Rivtow Marine Ltd v Washington Iron Works* (1974) 40 DLR (3d) 530, Supreme Court Canada, *Lambert v Lewis* [1980] 1 All ER 978, CA, [1981] 1 All ER 1185, HL, *Walton v British Leyland (UK) Ltd* (1978) Willis J, unreported, discussed in Miller, *Product Liability and Safety Encyclopaedia*, Div III, para [43.1], and, in general Miller & Lovell, *Product Liability*, Ch 16, Cane 'Physical Loss, Economic Loss and Products Liability' (1979) 95 LQR 117. Such questions include the liability of a manufacturer whose defective product damages itself (as when a television set catches fire), the drawing of lines to distinguish damage from insufficient durability and from a product which simply does not work, the ability to recover the cost of making a dangerously defective product safe, and a host of related issues. Of course all this is tied up with the relationship between contract (sales law) and tort, the role of privity of contract, and the distinction between that which is unmerchantable and that which is 'defective'.

Although the immediate concern of the *Junior Books* case was again with property rather than products, the implications are potentially more far-reaching. If a plaintiff may recover from a nominated sub-contractor with whom he has no contractual relationship the cost of repairing a defective (but safe) factory floor then there is, at worst, a weak analogy to support a similar claim against a manufacturer by a consumer buyer and conceivably also by a disappointed donee. Admittedly this would have the benefit of bringing the law more into line with the general expectations and (mis)understandings of ordinary consumers (see, eg Which, January 1975), but, as their Lordships recognised, there are problems in extending the duty of care 'beyond a duty to prevent harm being done by faulty work to a duty to avoid such faults being present in the work itself' ([1982] 3 All ER at p 213 per Lord Roskill). These problems include that of determining the standard of quality by which the goods or workmanship is to be judged, the effect on the otherwise valid exemption clauses of commercial parties and, to a lesser extent, the ability to tie any such development in with the practice of issuing limited manufacturers' guarantees.

The first problem seems largely illusory in the case of ordinary consumer goods when the retailer may act as no more than a convenient conduit between the manufacturer and the consumer, but the second is altogether more substantial. If a consumer, C, were to have a direct action against a manufacturer, A, in respect of safe but shoddy goods, then this would be apt to circumvent A's fair and reasonable exemption clause in his contract with B, the retailer from whom C bought the goods. Lord Roskill conceded that such a clause might be effective to limit the scope of any duty owed by A to C (at p 214 and see also the reference to the problem in Lord Brandon's dissenting opinion at p 218)—perhaps along the lines of the disclaimer of responsibility in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575—but the analogy is by no means straightforward. A's potential liability to C hardly depends on even a notional 'assumption of responsibility', and C would typically have no means of knowing on what terms A and B contracted and so whether a duty was owed to him. His position seems markedly different from that of the plaintiff advertising agents in the *Hedley Byrne* case.

The two related control mechanisms recognised in the present case are

those associated with the speech of Lord Wilberforce in the *Anns* case ([1977] 2 All ER 492, 498) namely that there must be (i) a sufficient relationship of proximity between the parties and (ii) no considerations which ought to negative or restrict the duty of care which generally followed from such proximity. Either of these two factors might be called in aid to limit the scope of the decision, especially as in *Junior Books* itself the relationship was as 'proximate' as might be imagined. Indeed Lord Fraser stated that he relied particularly 'on the very close proximity between the parties' to distinguish the case 'from the case of producers of goods to be offered for sale to the public' (at p 204). In similar vein Lord Roskill stated that, 'proximity must always involve, at least in most cases, some degree of reliance', adding that

> 'it would not easily be found to exist in the ordinary everyday transaction of purchasing chattels when it is obvious that in truth the real reliance was on the immediate vendor and not on the manufacturer' (at p 214).

Although this may be true where the buyer has a 'particular purpose' in mind and is relying on the seller's skill and judgment (cf s 14(3) of the Sale of Goods Act 1979), it is not true of the everyday purchase of brand-name goods where the reliance is rather on the manufacturer. Lord Keith sought to confine the scope of liability in a somewhat different way, emphasising the commercial context of operations which were being carried out at a less profitable level, and adding that in his opinion a duty would not be owed if the complaint were simply that the flooring was defective or valueless and useless and required to be replaced (at pp 206–207). The same hesitations were apparent (although with less justification) in the Court of Appeal in *Lambert v Lewis* [1980] 1 All ER 978 and, whichever way the matter is approached, it seems unlikely that the present decision will have more than a marginal application in the consumer context. For example, it might apply where goods have been manufactured to a (named) consumer's specifications.

One point which received support from the case, and was indeed accepted by Lord Brandon in his dissenting opinion (at p 217), is that a manufacturer may be liable in tort for the reasonably incurred costs of rendering a dangerously defective product safe. So the dissenting judgment of Laskin J in the *Rivtow Marine* case (1974) 40 DLR (3d) 530 has been further vindicated. The scope of such liability has still to be explored but its general acceptance against the background of the facts of the *Junior Books* case suggests that it may not necessarily be ruled out simply because the plaintiff has the option of closing down a factory or ceasing to use a product—an option which was not readily available in the *Rivtow Marine* case where the crane would not have been safe had it been left unused. If a plaintiff may recover in tort in respect of such expenditure then it must presumably follow that he can recover also where the only economic course is to scrap the product; so too in a case where the product has damaged itself because the danger has not been discovered in time.

Misrepresentation

Of the other cases reported in 1982, *Walker v Boyle* [1982] 1 All ER 634 can perhaps claim to be at the limits of consumer law in its discussion of misrepresentations and s 3 of the Misrepresentation Act 1967. From the point

of view of the consumer qua purchaser of real property the case should be noted for its holding that a common-form clause in standard conditions of sale was not 'fair and reasonable' for the purposes of the 1967 Act and s 11 of the Unfair Contract Terms Act 1967. Nor did a standard reply on preliminary inquiries that accuracy was not guaranteed prevent the answers from being representations of fact. Accordingly the plaintiff was entitled to the return of his deposit when an innocent misrepresentation was made as to the existence of a boundary dispute. (See also pp 74, 75, post).

Lost luggage

By way of contrast *Collins v British Airways Board* [1982] 1 All ER 302, CA serves as a timely reminder that it is not in the case of every contract that a consumer can assume that a limitation clause is binding only if it satisfies some requirement of 'reasonableness'. Certain contracts are not within the Unfair Contract Terms Act 1977, including contracts for international carriage by air under the Warsaw Convention. Accordingly the plaintiffs who had had luggage stolen on a flight from Manchester to Los Angeles could recover only its value 'by weight' (£580) and not its full value which was agreed to be £2000. The main point of contention in the case was whether the luggage was 'registered baggage', a requirement which the Court of Appeal held to be satisfied. A consumer whose luggage is of greater value than that covered should, of course, take out appropriate insurance cover, but whether this is typically done in practice is another matter.

Contempt of Court

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Introduction

Reported cases on contempt of court in 1982 continue to lend weight to Joseph Moskovitz's apt description of contempt as being 'the Proteus of the legal world, assuming an almost infinite diversity of forms' (see (1943) 43 Col LR 780). The breadth of the subject matter is indicated by the fact that it has included activities as diverse as condemning so-called 'mercy killing' during the trial of a paediatrician for the attempted murder of a mongoloid child, supplying a journalist with copies of documents disclosed on discovery and read out in open court, denying a prisoner access to the High Court, ordering the postponement of the reporting of proceedings, scandalising a court or judge, and assisting in the breach of Mareva injunctions. Moreover the subject is no respecter of status and potential contemnors have included such eminent persons or bodies as Sir David English (Editor of the *Daily Mail*), Harriet Harman (a solicitor who acts for the National Council for Civil Liberties), Colin Honey (Governor of Her Majesty's Prison at Albany on the Isle of Wight) and the commercial banks. Some of the cases have begun to assist in the interpretation of the Contempt of Court Act 1981, but others are concerned with matters which remain unaffected by the Act.

A-G v English [1982] 2 All ER 903

One of the most important functions of the law of contempt is to strike a balance between the demands of a fair trial and unimpeded forensic process (especially in relation to criminal cases) and those of a free press. Generally English law has adopted a somewhat uncompromising approach in favouring the former demands and in my view this is right. However there are situations in which this ordering of priorities is more questionable and where the conflict is not so easy to resolve. *A-G v English* [1982] 2 All ER 903 was such a case and it provided the House of Lords with an early opportunity to consider the 'strict liability' rule of ss 1–7 of the Contempt of Court Act 1981. The background was that a certain Mrs Carr, who had been born without arms, was standing as a 'pro-life' candidate at the Croydon North-West by-election. She had the support of Mr Malcolm Muggeridge who wrote a polemical article in the *Daily Mail* which read in part as follows:

> 'Today, the chances of such a baby surviving would be very small indeed. Someone would surely recommend letting her die of starvation or otherwise disposing of her . . . With the developing skills of modern medicine, the human race could be pruned and carefully tended until only the perfect blooms—the beauty queens, the Mensa IQ's, the athletes—remained.'

This article appeared during the highly publicised trial at the Leicester Crown Court of a paediatrician, Dr Arthur, for the attempted murder of a

mongoloid (Down's syndrome) child and there can be no real doubt that a juror in the Arthur trial would have assumed (wrongly as it happened) that Mr Muggeridge had that trial in mind. The Attorney-General instituted contempt proceedings against the editor and owners of the newspaper, maintaining that the article was in breach of the 'strict liability rule', a contention which was accepted by the Divisional Court. On appeal to the House of Lords two main issues fell to be considered, namely (i) whether the article satisfied the test of liability for contempt under s 2(2) of the Act and, if so, (ii) whether it was nonetheless saved by the qualification to liability for the discussion of public affairs of s 5.

Section 2(2) of the Act provides that: 'The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.' This test of contempt emerged from an amendment moved by Lord Wigoder when the Bill was at its Report stage in the House of Lords (see 417 HL Official Report (5th series) col 143), the word 'substantial' being introduced with a view to tightening the test proposed by the Phillimore Committee (see 'Report of the Committee on Contempt of Court', Cmnd 5794, para 113). Admittedly Lord Hailsham LC thought that the additional word made no difference and that its insertion was akin to 'a sort of medieval monk's question as to how many angels stood on the point of a needle' (*ibid*). It now seems that this view has, in effect, been vindicated. In any event Lord Diplock, with whose speech the other members of the House of Lords agreed, held that the combination of the two words 'substantial' and 'seriously' was 'intended to exclude a risk that is only remote' ([1982] 2 All ER 903, 919). If the outcome of a trial, or the need to discharge a jury, were put at risk and the risk is real, as opposed presumably to remote or illusory, that would be sufficient. On the facts of the case the criterion of s 2(2) was satisfied. Whilst agreeing that the overall conclusion is realistic, Lord Diplock's general approach is, with respect, easier to reconcile with the dictionary definition of the words than with ones sense of the conscious attempt which had been made to provide a somewhat less restrictive test of contempt.

If there are grounds for regretting the House of Lord's approach to the wording of s 2(2) these are at least partly offset by its approach to s 5 which makes provision for an important qualification to liability under the strict liability rule. By s 5,

> 'A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.'

In dealing with this section the House of Lords held that it was not a 'defence' properly so-called (as had perhaps been too readily assumed), but rather a qualification to liability the existence of which must, where appropriate, be negatived by the prosecution. This, with respect, is clearly right. Further, the House held in relation to the facts of the case that the article constituted both a discussion of 'public affairs', namely Mrs Carr's candidature in a pending by-election, and part of a wider discussion on a matter of current and 'general public interest', namely the moral justification for the so-called mercy killing of the severely handicapped. There being no question

of bad faith, the final requirement which was also held to be satisfied was that the risk of prejudice to Dr Arthur's trial was 'merely incidental' to the discussion—an expression which Lord Diplock took to mean 'no more than an incidental consequence of expounding its main theme' (at p 920). It was not in point that a 'pro-life' article might have been written in a way which would not have prejudiced the accused's trial and no breach of the strict liability rule had been committed. Lord Diplock explained and justified the decision in the following terms:

> 'To hold otherwise would have prevented Mrs Carr from putting forward and obtaining publicity for what was a main plank in her election programme and would have stifled all discussion in the press on the wider controversy about mercy killing from the time that Dr Arthur was charged in the magistrates' court in February 1981 until the date of his acquittal at the beginning of November of that year; for those are the dates between which under s 2(3) and Sch 1, the legal proceedings against Dr Arthur would be 'active' and so attract the strict liability rule.
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> Such gagging of bona fide public discussion in the press of controversial matters of general public interest, merely because there are in existence contemporaneous legal proceedings in which some particular instance of those controversial matters may be in issue, is what s 5 of the Contempt of Court Act 1981 was in my view intended to prevent.' (at p 920).

This is an important decision and it gives grounds for hoping that s 5 will not be construed too narrowly. However there are many difficult points which will need to be explored before the overall impact of the decision becomes apparent. One is the likely attitude of the courts towards the notion of a matter of 'general public interest' which is not necessarily the same thing as a matter in which the general public is interested. 'Mercy killing' and, in relation to the subsequent Fagan proceedings, entry into Buckingham Palace by an intruder (see *A-G v Times Newspapers Ltd* (1983)) may prove to have provided a deceptively easy start for those concerned to interpret the scope of s 5. Next is the question whether the 'merely incidental' requirement is capable of being satisfied where the proceedings which have been put at risk are a focal point of the article and yet at the same time illustrative of a matter of general public concern. Unless it is, much of the liberalising effect of s 5 may be lost since the press is not normally concerned to theorise or debate issues in the abstract. In my view the application of s 5 to such a case should not be ruled out provided that the prejudicial material is clearly relevant to the general discussion.

Another question which it is possible to touch on only briefly is the extent to which the Crown can avoid the restrictions of s 5 by the relatively simple expedient of proceeding on some basis other than the 'strict liability rule'. The point is that s 5 leaves untouched those cases in which the contention is not that justice has been impaired in relation to *particular* proceedings, but rather that it has been impaired as a general or continuing process. Similarly it is clear from s 6(c) of the Act that s 5 does not assist where the conduct is 'intended to impede or prejudice the administration of justice'. Both aspects of this limitation are likely to prove troublesome. For example in the *Sunday Times* case (*A-G v Times Newspapers Ltd* [1973] 3 All ER 54) the finding of contempt was not based on what is now called the 'strict liability rule'. Rather the exerting of public pressure on the Distiller's company was quite inten-

tional and it was held to be objectionable (as was the prejudgment of issues in the case) on account of its propensity to affect litigants generally. Others would not come forward with the same degree of freedom if abuse and obloquy were allowed to go unrestrained. Significantly Lord Diplock described Mr Muggeridge's article as the antithesis of the article in the *Sunday Times* case (see [1982] 2 All ER 920), so giving a fairly clear indication that s 5 would not have assisted the *Sunday Times*. Neither this case, nor indeed others, give much assistance in determining when precisely a publication will be regarded as having been *intended* to impair justice. For the Law Commission this should apparently involve an intent to procure a 'wrong' result (see 'Offences Relating to Interference with the Course of Justice' (Law Com no 96) para 3.77), but it is submitted that this is too narrow a view. Results of trials are not always susceptible of being described as 'right' or 'wrong', and elsewhere it is readily recognised that 'right' results may be achieved by impermissible means (see also the reference to *R v Selvage* [1982] 1 All ER 96 post).

R v Horsham Justices, ex p Farquharson [1982] 2 All ER 269

A related and similarly problematical aspect of contempt arises in relation to reports of court proceedings where there may be a conflict between the general principle of open justice associated with *Scott v Scott* [1913] AC 417, HL and the perceived dangers which this may sometimes hold for a fair trial. Various qualifications to the general principle of open justice have been recognised over the years—whether in the form of an entitlement to hear a case *in camera* or in chambers (see eg the provisions in s 6 of the Criminal Justice Act 1967 relating to committal proceedings), a power to confer anonymity on a witness (see eg *Socialist Worker, Printers and Publishers Ltd, ex p A-G* [1975] 1 All ER 142, DC: blackmail victims; *A-G v Leveller Magazine Ltd* [1979] 1 All ER 745, HL, and the Contempt of Court Act 1981, s 11), and a power to order the postponement of reporting of proceedings. It was this last point and its relationship to the 'strict liability rule' of contempt which was discussed by the Court of Appeal in *Horsham Justices, ex p Farquharson* [1982] 2 All ER 269.

The facts of the *Horsham Justices* case were complex and on one view it was 'an entirely exceptional case, of a transitional nature' which, with the enactment of the Criminal Justice (Amendment) Act 1981, will never occur again (p 284 per Lord Denning MR). In one sense this is right since this Act has removed the earlier entitlement of one co-accused (D1) to have the restrictions on reporting committal proceedings (see the Magistrates' Courts Act 1980, s 8) lifted notwithstanding the objections of a co-accused (D2)—a state of affairs which had earlier caused problems in, for example, the Thorpe commital proceedings. Since the coming into force of the Act on 2 October 1981 a magistrates' court is to lift reporting restrictions in such a case 'if, and only if, it is satisfied, after hearing the representations of the accused, that it is in the interests of justice to do so'. Moreover the High Court has recently stressed that the *prima facie* rule is against publicity (see *R v Leeds Justices, ex p Sykes* [1983] 1 All ER 460).

The immediate cause of the problem in the *Horsham Justices* case was that the committal proceedings of four co-accused charged with 'gun-running'

offences commenced before the coming into force of the 1981 Act and reporting restrictions were lifted on 23 June 1981. The Contempt of Court Act 1981 came into force on 27 August 1981 and on the resumption of the committal proceedings the justices acceded to an application for an order under s 4 of this Act, 'prohibiting the report of any part of the proceedings until the commencement of any trial hearing'. A journalist, a local newspaper and the National Union of Journalists then sought to have the order quashed. Both the Divisional Court and the Court of Appeal agreed that examining justices had a power to make such an order under s 4 and that the particular order which had been made was too wide in its terms; so the case was remitted to the justices for reconsideration. However the case is of more general importance, especially in relation to the scope of s 4.

Section 4(1) of the Contempt of Court Act provides that

> '. . . a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith',

so clarifying an apparent divergence of opinion as to the legality of fair and accurate reports of court proceedings which contain potentially prejudicial matter. Such reports of committal proceedings were lawful at common law (see *R v Evening News, ex p Hobbs* [1925] 2 KB 158 and the judgment of Ackner LJ in the present case [1982] 2 All ER 269, 291–293) but, it seems, unlawful where the prejudicial matter was in a report of part of a trial heard in the jury's absence (see *R v Border Television Ltd, ex p A-G* (1978) 68 Cr App Rep 375, DC). The legality thus conferred by s 4(1) is immediately qualified by a wide ranging power to order the postponement of reporting.

By s 4(2) it is provided that:

> 'In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.'

A number of points may be noted about this controversial provision. First, the risk of prejudice which it is sought to avoid may be to either the self-same proceedings (as when a guilty plea is entered or a confession ruled inadmissible in the jury's absence) or to other proceedings which are 'pending or imminent'. The latter expression covers both the *Horsham Justices* case itself, where the 'other proceedings' were the pending trial in the Crown Court, and cases in which distinct proceedings are pending or imminent, whether against the accused himself or a third party (see the reference to the *Poulson* trial in 1974 in Miller, *Contempt of Court* (1976), pp 118–119). In theory the power to make an order under s 4 extends to civil as well as to criminal proceedings. The words 'pending' and 'imminent' have been the subject of much judicial and academic discussion over the years (see generally Miller, op cit Ch 6 and Borrie and Lowe, *The Law of Contempt* (1973), Ch 5). Second, it is clear that different judges (and magistrates) will hold quite different views as to the likelihood of prejudice and hence the *necessity* (not simply desirability) of an order to postpone reporting for a given period. For some the risk of prejudice will readily be regarded as 'substantial', at least when a

jury trial is involved. Others, like Lawton J in the *Kray* case ((1969) 53 Cr App Rep 412, 414) and Lord Denning MR in the present case ([1982] 2 All ER 269, 287) will credit jurors with shorter powers of recollection or as being 'good sensible people' who 'go by the evidence that is adduced before them and not by what they may have read in the newspapers'. There is no simple way of establishing a consistent (or, for that matter, 'correct') approach and s 4 orders are not subject to appeal as opposed to judicial review. Third, it seems, perhaps curiously, that an order is needed in all cases and even where prejudicial matter is discussed in the absence of a jury. However, if a judge overlooks the point the 'good faith' proviso of s 4(1) may be called in question. A recent Practice Note ([1983] 1 All ER 64) may facilitate a consistent approach.

Finally, there is the difficult point of what precisely is the effect of non-compliance with an order made under s 4. Here Michael Beloff QC submitted that this would not, without more, be a contempt but would be so only if (i) it would have been a contempt at common law and (ii) a resultant breach of the strict liability rule could be established. The lynchpin of this submission was s 6(b) of the 1981 Act which provides that nothing in the earlier provisions of the Act implies 'that any publication is punishable as contempt of court under that rule [*scil* the 'strict liability rule'] which would not be so punishable apart from those provisions'. Lord Denning MR accepted at least the first limb of this submission (see [1982] 2 All ER 269, 285–286) which may involve little more than the inconvenience of reference back to the common law which itself recognises a power to order the postponement of reporting (see eg, *R v Clement* (1821) 4 B & Ald 218, 106 ER 918). However acceptance of the second limb, namely that a s 4 order does no more than remove a defence to the strict liability rule of contempt, would be altogether more limiting and it is submitted, with respect, that Ackner LJ was correct in rejecting both limbs of the submission (see [1982] 2 All ER at pp 295–296). Unlike s 11 of the Act (publication of matters exempted from disclosure in court) s 4 does not have any qualifying reference to a pre-existing power and, in spite of the curious structure of the Act, it seems clear that non-compliance with a s 4 order is of itself a contempt of a different category from that which is committed where the 'strict liability rule' is breached. If this were not so an order in relation to proceedings which were 'pending or imminent' would be a mere *brutum fulmens* until the proceedings became 'active' (see s 2(3) of the Act) and, it seems, an order could have no effect where committal proceedings are concerned since a fair and accurate report of such proceedings was lawful at common law (cf, however, Lord Denning's suggestion at p 287 that it would not have been lawful if an order had been made postponing publication). Admittedly the latter objection would not usually have much substance after the coming into force of the Criminal Justice (Amendment) Act 1981 (see above), but there may well be cases where it is the trial of a third party rather than one or more of the co-accused which is likely to be prejudiced. More generally, it seems undesirable so to interpret the section as to permit of an element of 'second-guessing' on the issue of whether a substantial risk of prejudice would indeed follow from the breach of an order.

Badry v DPP of Mauritius [1982] 3 All ER 973

Although the protection of an accused is the principal purpose of the law of criminal contempt, the subject is much wider than this. Undoubtedly one of its most controversial parts is that which holds it to be an offence to 'scandalise' a court or judge in such a way as to impair public confidence in the administration of justice. The judgment of a strong Privy Council in *Badry v DPP of Mauritius* [1982] 3 All ER 973 establishes (or perhaps confirms) an important limitation to this aspect of contempt. The case had its origins in the politics of Mauritius where Badry, a prominent local political figure, had been the subject of an inquiry into allegations of corruption. The inquiry was conducted by a Supreme Court judge, Glover J, who was sitting as an appointed commissioner, and its adverse findings led Badry both to proclaim that a Supreme Court decision in a workman's compensation case had been reached through bias and to abuse Glover J in his role as a commissioner.

So far as the former allegation was concerned the Privy Council confirmed the Supreme Court's conclusion that it was a contempt as being 'meant to shake public confidence in the administration of justice in Mauritius' (at p 979). Such accusations of bias have not infrequently been held to be a contempt in both English and Commonwealth cases (see generally Miller, *Contempt of Court* Ch 10 and Borrie and Lowe, *The Law of Contempt* Ch 6) although, as Lord Hailsham LC, observed, 'nothing really encourages courts or Attorneys General to prosecute cases of this kind in all but the most serious examples' [1982] 3 All ER at p 979). However, in the judgment of the Privy Council, the scurrilous abuse of Glover J was not capable of constituting a contempt since it referred to him as a commissioner and not as a judge. The distinction is in a sense artificial in as much as judges are appointed as commissioners precisely because of their judicial capacities and the public is hardly likely to assume that the abuse relates to the judge *qua* commissioner alone. Yet it is also a logical application of the decision of the House of Lords in *A-G v BBC* [1980] 3 All ER 161, holding that the law of contempt of court applies only in relation to such bodies as exercise the judicial power of the state. In that case a local valuation court (although called a 'court') was not such a body. Ideally one would wish to have a comprehensive list of such bodies, but the government was unable to produce one when the Contempt of Court Bill was being debated in Parliament (see 6 HC Official Report (6th series) col 917). Hence the uncertainty remains.

Raymond v Honey [1982] 1 All ER 756

In recent years the expression 'access to justice' has come to be associated with the procedural and other barriers to enforcing common law and statutory rights. However access to the courts may be denied in a more immediate and literal sense and this again is the province of the law of contempt. The point arose in an unusual way in *Raymond v Honey* [1982] 1 All ER 756, HL where the applicant was a convicted prisoner serving a sentence of imprisonment at HM Prison, Albany. He sought to write to his solicitor, but the letter was opened and then stopped when found to contain an allegation that an assistant governor had committed theft. According to the governor's subsequent affidavit, the applicant was informed that he could communicate

with his solicitor, who was in any event due to visit him within the next few days, if he omitted this allegation. Being undaunted the applicant then prepared an application to commit the prison governor for contempt, but the letter containing the application and the supporting documentation was again stopped and was not allowed to be forwarded to the High Court. The ensuing application to commit the governor was based on the stopping of both letters, the main point of contention being whether the Prison Rules 1964 made under the Prison Act 1952 and standing orders made by the Secretary of State justified such action. There was no challenge to basic principles recognising the right of access to the courts and the continuing civil rights of convicted prisoners. Hence on one view the case is concerned mainly with the scope of the 1952 Act and the interpretation of rules made thereunder. Yet it is important also as illustrating the role of contempt in underpinning the right of uninhibited access to the courts. In the result the House of Lords held that the Prison Act 1952 (and *a fortiori* the rules and standing orders) did not affect such basic principles, and that the governor was in contempt in denying the applicant access to the High Court. On the facts it had not been established that the stopping of the earlier letter constituted an interference with the due administration of justice.

Home Office v Harman [1982] 1 All ER 532

Some three weeks before the decision in *Raymond v Honey* their Lordships delivered their opinions in *Home Office v Harman* [1982] 1 All ER 532. Both cases originated in the problems of prisoners, but the *Harman* case generated deep divisions of opinion both as to the scope of the issues raised and as to their appropriate resolution. The background was that one Michael Williams had brought an action against the Home Office in relation to his detention in a special 'control unit'. Harriet Harman of the National Council for Civil Liberties acted in her personal capacity as his solicitor. For the purposes of this action the Home Office produced some 6,800 pages of documents pursuant to orders of specific discovery. Public interest immunity had been unsuccessfully claimed in relation to six documents containing minutes of high level policy matters (see *Williams v Home Office* [1981] 1 All ER 1151, Macneill J), and these and other documents totalling 800 pages in all were made up into bundles for the purposes of the trial. The first five days of the trial were taken up by an opening speech in which (it was accepted) counsel for Williams read all 800 pages, or at least their material parts, aloud. Thereafter Miss Harman allowed David Leigh, an experienced journalist working for the *Guardian* and who had been present for part of the proceedings, to have access under her supervision to these documents and to take notes from them. He was not allowed access to documents which had not been read out in court, nor to remove or photocopy documents produced on discovery. Mr Leigh then wrote a critical feature article entitled, 'How Ministry hardliners had their way over prison units' which contained quotations from the documents produced on discovery. The Home Office contended that Miss Harman's conduct amounted to a contempt as being in breach of an undertaking not to use such documents for any collateral or ulterior purpose not reasonably necessary for the proper conduct of the action. It was not disputed that such an undertaking was implied automati-

cally by the process of discovery (see, eg, *Riddick v Thames Board Mills Ltd* [1977] 3 All ER 677, 687 *per* Lord Denning MR) and indeed, in a letter to the Treasury Solicitor's Office, Miss Harman had acknowledged the existence of the undertaking expressly. The point of contention was whether the undertaking came to an end once documents had been read out in open court.

As Lord Scarman noted in his dissenting speech, which expressed views shared by Lord Simon, previous authority had not decided this point and the matter was accordingly one of 'policy and principle' [1982] 1 All ER at p 543). For his Lordship the case concerned freedom of expression, open justice, the values of Milton as expressed in the Areopagitica, the ability to disseminate information which was within the 'public domain', and the requirements of freedom of expression as enshrined in Article 10 of the European Convention, with which he thought the majority view might be inconsistent. Lord Diplock approached the case in a narrower way, denying that it was concerned with any such matters and asserting that it involved only an aspect of the law of discovery—a process which was unknown to the civil law of the majority of states that were parties to the Convention. This difference in perspective largely determined the outcome of the case, with the majority of their Lordships holding that Miss Harman had committed a civil contempt through breaking the obligations of her undertaking.

At first sight this seems an unjustifiable and indeed absurd conclusion. Had Mr Leigh been present in court it would have been permissible for him to have reported what he had heard read out since there was no question of an order having been made directing that the 'sensitive' parts of the documents be read in closed court. Failing that, it would similarly have been permissible for him to have used the newspaper's resources to meet the expense of obtaining a transcript of the opening speech or for Miss Harman to have provided him with one. Equally there was considerable difficulty explaining precisely why the conclusion might have been different if the documents had been shown to a person concerned in the publication of the ordinary or daily law reports (such as those which appear in *The Times*) as opposed to a reporter who was writing a feature article. Lord Roskill's suggestion that disclosure in aid of the former reports should be seen 'as being for the immediate purpose of the litigation in question and not as collateral or ulterior to it' (at p 555) is, with respect, difficult to follow. It is not apparent why the facilitation of such reports should be reasonably necessary for the proper conduct of *that* litigation and, if the concern is with wider considerations, many more readers will turn to feature articles than to law reports. Although Lord Diplock stressed that the notion of using documents for a 'collateral or ulterior' purpose did not have any pejorative connotations (see p 536), no doubt there will be sceptics who will regret that the case happened to involve Miss Harman, the *Guardian* and the Home Office, rather than some other combination of interested parties.

This is not to deny that there are very strong (perhaps compelling) arguments in favour of the majority decision. Discovery is both an aid to justice and at the same time a mechanism for bringing forward potentially damaging, embarrassing and confidential documents. It is not obvious that the various aspects of justice are best served by creating barriers to the effective operation of discovery when a litigant may find the threat of widespread publicity a more immediately effective deterrent than the prospect of com-

mittal for contempt which is the ultimate sanction against non-disclosure. Of coure such litigants may include persons or bodies who, to a 'libertarian', strike a more readily sympathetic cord than does the Home Office. Again it cannot sensibly be denied that there would be something very artificial about a rule whose operation depended in large measure on whether a judge chose to save (expensive) court time by reading lengthy documents overnight, rather than by allowing them to be read in open court. Delays in court hearings are themselves a substantial and notorious impediment to justice and a premium should not be placed on the uneconomic use of court time. Yet such arguments cannot be pushed too far since, as Lord Scarman observed, 'if the price of expedition is to be the silent reading by the judge before or at trial of relevant documents, it is arguable that expedition will not always be consistent with justice being seen to be done' (at p 547). Less persuasive is the argument that the anomaly about the transcript is more apparent than real since reporters (and other interested parties) will not typically incur the potentially substantial cost of entering 'private bargains' with shorthand writers. That such information should be so costly is itself singularly difficult to reconcile with a broadly conceived notion of open-justice. In short the problems of the *Harman* case do not lend themselves to an easy solution. Whether their resolution is best achieved with the aid of the European Court of Human Rights or through the deliberations of the Bingham Committee is a point on which opinions may, and no doubt do, legitimately differ.

Whitter v Peters: Peart v Stewart [1982] 2 All ER 369

Further problems of civil contempt were before the Court of Appeal in *Whitter v Peters: Peart v Stewart* [1982] 2 All ER 369 where the court was faced with two related issues concerning the powers of a county court under s 14 of the Contempt of Court Act 1981 where there has been a breach of a court order. The first was whether the Lambeth County Court was an inferior court for the purposes of the case and the second was whether the maximum penalties of s 14 apply to such civil contempts, as well as to criminal contempts.

The appellants in two separate cases had been committed to prison by his honour Judge McDonnell for terms of four and six months respectively, the committals being in respect of breaches of orders made under the Domestic Violence and Matrimonial Proceedings Act 1976, s 1. There is no doubt that a county court is in general an 'inferior court' of limited jurisdiction and so is *prima facia* subject to the one month time limit for such committals as are within s 14 of the 1981 Act. However by s 74(1) of the County Courts Act 1959 it is empowered in relation to such injunctions to 'grant such relief, redress or remedy . . . as ought to be granted or given in the like case by the High Court and in as full and ample a manner', and by s 19 of the Contempt of Court Act 1981 a 'superior court' is defined to mean '. . . the High Court . . . and any other court exercising in relation to its proceedings powers equivalent to those of the High Court . . .' In the judgment of the Court of Appeal (Ormrod LJ and Mrs Justice Booth) the effect was to render a county court a 'superior court' for the purposes of the case, so permitting the imprisonment for terms of four and six months respectively.

On this view it was not necessary for the court to decide the more general point of whether the limits of s 14 are in fact applicable to contempts of the present category or whether they apply only to *criminal* contempts. The major argument against s 14 extending to civil contempts or 'contempts in procedure' is that it falls within a part of the Act headed 'Penalties for contempt and kindred offences', and it is doubtful whether a committal for such a contempt can be properly described as a 'penalty' or as being in respect of an 'offence'. The point was stressed by Sir John Donaldson when it was the policy of certain trade unions to disregard the orders of the National Industrial Relations Court of which he was President (see *Goad v AUEW (No 3)* [1973] ICR 108, 111, and, in a quite different context, *Martin v Bannister* (1879) 4 QBD 491, 492 per Bramwell LJ). Of course part of the difficulty is that the judicial response to non-compliance with injunctions may be motivated by two quite distinct considerations. Where compliance is still possible (as when there is a continuing nuisance) a committal may be coercive and with a view to ensuring future compliance. However it is well settled that non-compliance may similarly be visited with a term of imprisonment or a fine even though D's acts, for example, the destruction of a document or the cutting down of a tree, have made future compliance impossible (see generally *Jennison v Baker* [1972] 1 All ER 997, *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1963] 3 All ER 493). In such cases the intention can be only to punish past disobedience and thereby advance the cause of justice generally.

In *Danchevsky v Danchevsky* ([1974] 3 All ER 934, 937) Lord Denning MR summarised the position by saying:

> 'It seems to me that when the object of the committal is punishment for a *past* offence, then, if he is to be imprisoned at all, the appropriate order is a fixed term. When it is a matter of getting a person to do something in the future—and there is a reasonable prospect of him doing it—then it may be quite appropriate to have an indefinite order against him and to commit him until he does it.'

Where the purpose was coercive and the committal *sine die* a contemnor who remained obdurate would normally be released after a relatively short period and would not of course be imprisoned for life (see *Re Barrell Enterprises* [1972] 3 All ER 631, *Yager v Musa* [1961] 2 All ER 561, *Enfield London Borough Council v Mahoney* (1983) Times, 24 March, and, in general, Miller, op cit, pp 256–257).

In discussing these matters the Phillimore Committee recommended the abolition of *sine die* committals and the imposition of a maximum fixed term of two years (see Cmnd 5794, 1974, paras 172, 199–201). In my view this recommendation was unfortunate, especially in relation to non-compliance with positive or mandatory orders requiring, for example, the delivery up of persons or documents. Nonetheless it seems right to assume that Parliament intended the fixed term requirements of s 14 of the 1981 Act to extend to civil as well as criminal contempts. However two points should be noted. First, it remains open to a contemnor subject to such a fixed term to apply for an earlier release (see *Yager v Musa* [1961] 2 All ER 561, *Vaughan v Vaughan* [1973] 3 All ER 449). The term is therefore only a maximum. Second, the maximum is essentially provisional since the fixed term applies only on 'any occasion'. Hence a contemnor who, on being released, continues to disobey an injunction etc may be committed for a further fixed term.

Postscript

On further appeal the House of Lords has held that a county court remains an 'inferior court' for all purposes. The appeal in *Peart v Stewart* was allowed and the six month term of imprisonment reduced to one month (see [1983] 1 All ER 859, HL).

Z Ltd v A [1982] 1 All ER 556

Z Ltd v A [1982] 1 All ER 556, CA is of considerable interest both in providing guidelines to banks and similar bodies as to their obligations following the granting of a Mareva injunction and, more generally, in its discussion of the position of third parties whose acts may assist in or procure the breach of an order or undertaking. The problem arises because a Mareva injunction operates *in rem* on the assets to which it extends, thereby subjecting banks to the risk of committing a contempt by assisting in its breach—perhaps through the simple act of honouring a cheque. The case is important also for its discussion of the use and abuse of Mareva injunctions (see also *Galaxia Maritime SA v Mineralimportexport, The Eleftherios* [1982] 1 All ER 796, *CBS United Kingdom Ltd v Lambert* [1982] 3 All ER 237, CA), but comment in this section is limited to the contempt aspects. These were discussed in some detail by Eveleigh LJ, who stated the basis of liability for contempt as follows:

> 'I think that the following propostions may be stated as to the consequences which ensue when there are acts or omissions which are contrary to the terms of an injunction. (1) The person against whom the order is made will be liable for contempt of court if he acts in breach of the order after having notice of it. (2) A third party will also be liable if he knowingly assists in the breach, that is to say if knowing the terms of the injunction he wilfully assists the person to whom it was directed to disobey it. This will be so whether or not the person enjoined has had notice of the injunction.' ([1982] 1 All ER at p 566).

These propositions are helpful in clarifying both the position of a third party and the mental element required to ground liability for contempt. So far as the former point is concerned the third party's (D2's) liability has often been described as that of an aider and abettor of, or accessory to, the breach of an injunction binding on another (D1). However in Eveleigh LJ's judgment the true position is that such a person commits a contempt in his own right in as much as his conduct 'knowingly interferes with the administration of justice by causing the order of the court to be thwarted' (see at p 567 and see also Miller *Contempt of Court* p 250 where the same view is expressed). So there is no difficulty in holding that D2 may commit a contempt even though D1, who may not have the necessary notice of the injunction, does not (see also the judgment of Kerr LJ at p 572 agreeing on this point). What is less clear is whether one may contemplate D2 committing a contempt where D1's lack of liability rests on the simple fact that he has not broken the injunction. The issue would arise if, to build on an example taken in *Jennison v Baker* [1972] 1 All ER 997, CA, D1 is enjoined not to kill P's cat and D2, acting quite independently of D1 and with a view to thwarting the order, kills the cat himself. Eveleigh LJ's formulation of a third party's liability suggests that D2 would not be liable on such facts, but some may regard it as odd that D2

would commit a contempt by handing D1 the means of killing the cat and yet would not do so by killing it himself. Similar problems arise in the criminal law (see Smith and Hogan *Criminal Law* (4th edn) p 131 et seq and, for discussion in the context of contempt, Miller op cit p 247 et seq).

So far as the issue of a third party's knowledge or *mens rea* is concerned Eveleigh LJ's requirements extend to both (i) notice of the terms of the injunction and (ii) knowledge that what he is doing is in breach of those terms (see [1982] 1 All ER at p 568). Mere carelessness or even recklessness would not be sufficient, unless it could be shown 'that there was indifference to such a degree that was contumacious' (at p 570). Again this seems, with respect, to be the right approach, although it is doubtful whether one should go further and require something in the nature of an 'ulterior' or 'specific' intent to interfere with the administration of justice (see also the discussion of *Selvage* [1982] 1 All ER 96, post).

The requirements of knowledge are especially difficult to apply to corporate bodies including banks. In *Heatons Transport Ltd v Transport and General Workers' Union* [1972] 3 All ER 101 the House of Lords held that the defendant Union was liable for the acts of its servants or agents within the scope of their employment and not only for those of its committee and principal officers (its *alter ego*). Similarly, in the present case Eveleigh LJ was clear that 'the employer corporation will be responsible on grounds of vicarious liability' and that this was so 'whether the contempt is regarded as a criminal contempt and not simply civil contempt' (see [1982] 1 All ER at p 569). This causes more difficulty. In the *Heatons Transport* case the union was itself enjoined and its contempt was only civil. However it seems that (notwithstanding the force of Lord Atkinson's objections in *Scott v Scott* [1913] AC 417, 458–459) the contempt committed by a third party is criminal in character and English law does not normally recognise vicarious criminal liability, especially in relation to common law offences. Admittedly, contempt may be an exception in this respect and there is indeed some authority suggesting that this is so (see *R v Evening Standard Co Ltd, ex p A-G* [1954] 1 All ER 1026). To the extent that vicarious liability does apply its effect would be somewhat reduced by Eveleigh LJ's recognition that what may be termed the *Armstrong v Strain* principle ([1952] 1 All ER 139) was applicable also. Hence it was not possible 'to add together the innocent state of mind of two or more servants of the corporation in order to produce guilty knowledge on the part of the corporation', [1982] 1 All ER at p 569). Rather, one had to show that a person with notice of the injunction had authorised a payment, or had deliberately refrained from taking steps to prevent such a payment being made under a general existing authority.

R v Selvage [1982] 1 All ER 96

For all its wide-ranging characteristics contempt is in part an aspect of more general laws concerned with protecting the administration of justice and these include the broad common law offence of perverting the course of justice and its several variants. The limits of this indictable offence were at issue in the case of *R v Selvage* [1982] 1 All ER 96 where the accused had sought unsuccessfully to use her position as a clerk at the DVLC in Swansea to remove endorsements from the driving records of some of her friends.

Such conduct was covered by a specific statutory offence with a limited penalty, but the prosecution chose to charge the more serious common law offence of conspiring and attempting to pervert the course of justice (for general discussion of these and related offences see the Law Commission Report, 'Offences relating to Interference with the Course of Justice' (Law Com no 96)). In allowing her appeal against conviction the Court of Appeal agreed that these offences were 'not confined to matters directly concerning criminal proceedings already in being' [1982] 1 All ER at p 101 per Watkins LJ); rather they impinged on the process of investigating crime. However they were limited by at least two requirements. First, and this had not been clearly established hitherto, it must be shown that a course of justice has been embarked on 'in the sense that proceedings of some kind are in being or are imminent or investigations which could or might bring proceedings about are in progress . . .' (at p 103 per Watkins LJ). Otherwise the relevant act would not have the necessary tendency to interfere with the administration of justice. The requirement was held not to have been satisfied on the facts of the case where no relevant proceedings against Mrs Selvage's friends were contemplated. Even granted the correctness of the premise, the conclusion is not self-evident since justice is a continuing process which, it may be suggested, includes the carrying out of a sentence of imprisonment or subjection to a period of disqualification (cf Professor J C Smith, [1982] Crim LR 48).

The second principal requirement of the offence, that the act be done with an 'intent' to pervert the course of justice, is altogether more elusive. Moreover its precise analysis is especially important to the general law of contempt, since the Contempt of Court Act 1981 does not restrict liability for 'conduct which is intended to impede or prejudice the administration of justice' (see the discussion of *A-G v English*, above). On this issue the judgment is not as helpful as one might have hoped. The submission of the Crown was, in essence, that it was sufficient to establish that S has intentionally committed acts the tendency of which was to pervert the course of justice. This the Court of Appeal rejected, holding that it was necessary rather to establish an intent to pervert justice which, being classically 'and obviously a jury question' (at p 105) should have been put to the jury. Those of us who have been bitten by the 'subjectivist bug' would, in principle, agree But there are difficulties. Mrs Selvage was claiming, and it may be assumed, quite honestly, that her sole intent in seeking to cleanse the records was to enable her friends to find work. No doubt she did not address her mind to the issue of whether such conduct was a 'perversion of justice', but even if she had done her own views on the matter can hardly be treated as conclusive. If the notion of 'perverting justice' is to be seen as entailing a question of law (as it must surely do), then the fact that she did not regard what she had done as a 'perversion' is neither here nor there and the role of the jury is limited accordingly (see J C Smith [1982] Crim LR 49). Even if, in accordance with the present vogue, the notion is regarded as entailing a question of fact, it should be sufficient that an accused realised (if such was the case) that ordinary people would regard such conduct as a perversion of justice. It may be that there is a helpful analogy with the concept of dishonesty in the law of theft (see *R v Ghosh* [1982] 2 All ER 689, CA), but the precise characteristics of this elusive intent need further clarification.

Contract

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Formation

The House of Lords had two opportunities to consider problems concerned with formation during the course of 1982. *Brinkibon v Stahag Stahl* [1982] 1 All ER 293 was effectively a rerun of the well-known case of *Entores v Miles Far East Corpn* [1955] 2 All ER 493. The plaintiff sought leave to serve a writ out of the jurisdiction and this raised the question of where a contract, which had been concluded by exchange of telex messages, had been made. The message of acceptance had been sent by telex from London to Vienna. The House of Lords held that as telex communications were effectively instantaneous, the ordinary rule that acceptance does not conclude the contract until communicated applies, so that the contract was made in Vienna and not in London. It is worth noting that Lord Wilberforce expressly limited his judgment to what we may call the ordinary case, that is, where the telex message is sent directly by offeree to offeror during the ordinary business hours of each. In practice many telex messages are sent out of office hours or using intermediaries such as telex bureaux. Such variant cases were expressly reserved for future decision.

Sudbrook Trading Estate v Eggleton [1982] 3 All ER 1 shows a welcome degree of liberalisation in the requirement of contractual certainty. In this case a series of leases granted the lessee options to purchase the reversion at a price to be agreed by two valuers, one to be nominated by the lessor and the other by the lessee and in default of an agreement by an umpire to be appointed by the valuers. A minimum price was fixed in each case. Although the leases were clearly drawn up by lawyers the option clause provided no explicit machinery to deal with the situation where one of the parties refused to appoint a valuer. The lessee sought to exercise the option and the lessor refused to appoint a valuer claiming that the machinery for the ascertainment of the option price was defectively uncertain. There was substantial authority in favour of the lessor's argument and the Court of Appeal upheld it. The House of Lords (Lord Russell dissenting) reversed this decision and held that the exercise of the option had created a binding contract for the sale of the reversion. The central point of the majority reasoning was that the circumstances made it abundantly clear that the parties intended to enter into a legally binding contract to sell the reversion. In modern conditions the reference to the appointment of valuers showed that the price was to be a reasonable price, since valuers were now professional men, whose function it was to ascertain a reasonable price. Although the machinery established by the parties had broken down, the court would create its own machinery if satisfied that the intention was to enter into a legally binding contract. The House of Lords were agreed that although they would not compel the lessor to appoint a valuer yet, since the option created a binding contract, when exercised, to sell at a fair and reasonable price, the court could establish its

own machinery for the purpose of ascertaining the price. An important distinction was drawn between cases where failure to provide adequate machinery for the settlement of contractual terms means that there is no contract at all and cases where there was clearly a contract but with remediable defects in the machinery for ascertaining individual terms. Not only is this distinction important but the positive attitude of the House of Lords should encourage other courts in analogous cases to decide that the facts fall on the contract side of the contract/no contract line.

Implied terms

In *Mears v Safecar Security* [1982] 2 All ER 865, the Court of Appeal had to consider what term should be implied into a contract of employment as to sick pay. Mr Mears had been employed by Safecar Security, a small company employing some twelve employees, as a security guard from July, 1978. He had received a written document from the company setting out some, but not all, of the terms of the employment of which he was entitled to have notice under s 1 of the Employment Protection (Consolidation) Act 1978, and after the termination of his employment some fifteen months later he brought proceedings under s 11 of the Act to determine what particulars he should have been given as to sick pay. The evidence was that nothing had been said by either side about sick pay during the employment which had included one short and one long period of absence sick. During the absences the employee had been told by his fellow employees that he would not get any sick pay from the company and did not ask for any. There was significant authority, particularly the judgment of Pilcher J in *Orman v Saville Sports Wear* [1960] 3 All ER 105 that where the contract was silent about sick pay there was a presumption that the employee was entitled to it. The Court of Appeal rejected this argument and held that a court should approach the question without any preconception or presumption as to the answer, considering all facts and circumstances including the way in which the contract had been operated by the parties. This led the court to the conclusion that in the particular contract there was no adequate material for implying an undertaking by the employer to pay sick pay. In delivering the judgment of the Court of Appeal, Stephenson LJ said that the approach to be adopted was different from that suggested by the House of Lords in *Liverpool City Council v Irwin* [1976] 2 All ER 39 where it was said that certain contracts demand by their nature the implication of certain terms irrespective of the business efficacy or officious bystander tests. Although an efficacious contract of employment would require some term as to pay in the event of sickness it could not be said to be necessary either that there should be agreement for payment or that there should not. Accordingly no term as to sick pay could be said to be necessary and therefore one should not start with a presumption either way.

Formalities

The Statute of Frauds and its successors still continue to give employment to the courts in relation to informal evidence of contracts for the sale of land. In *Elias v George Sahely* [1982] 3 All ER 801 the central point was the possibility

of joining together two documents. The parties had orally agreed on a sale of business premises and the buyer's lawyer wrote to the seller's lawyer setting out the essential minimum terms and enclosing a cheque for 10% of the agreed price. The seller's lawyer did not reply by letter but sent a receipt setting out the names of the parties, the amount of payment and the fact that it was a deposit on a property to be sold by the seller to the buyer. The Privy Council upheld an appeal from the Court of Appeal of Barbados and held that the letter and the receipt could be read together. They applied the test laid down by Jenkins LJ in *Timmins v Moreland Street Properties* [1957] 3 All ER 265 that one should start by looking at the document signed by or on behalf of the person to be charged and see whether it contained a reference to the existence of another document. Once the second document has been identified the two documents can be placed alongside and if they contain all the terms of the contract satisfy the requirements of the statute. The Privy Council also disposed of a minor, but not uninteresting, point. The buyer's letter stated that the deposit was paid to the seller's lawyer as stakeholder and the seller argued that if his lawyer was issuing a receipt as stakeholder then the signature did not count as a signature on his behalf for the purposes of the statute. This argument was rejected on the grounds that there was no reason why, because the lawyer has accepted the deposit as stakeholder, he could not be authorised to sign a note or memorandum evidencing the existence of the contract. The key question is whether the person who signs is authorised to sign; if the person who signs is a solicitor, it is usually easy to infer that he has authority to sign and there was no convincing evidence to the contrary in the case.

In *Cohen v Nessdale* [1982] 2 All ER 97, tenants occupying a flat as statutory tenants entered into negotiations with their landlords for the possible sale to them of a long lease. Negotiations continued over some two months 'subject to contract' and were then broken off by the tenant. Later the tenant wrote suggesting re-opening negotiations and in due course the landlords wrote a letter containing a further proposal which was not stated to be subject to contract. In due course a complete oral contract was completed but the landlords later stated that they did not intend to proceed. The tenant argued that the landlords' letter could be used as evidence of the contract but this view was, with regret, rejected by the Court of Appeal. Once negotiations had started on a 'subject to contract' basis the usual inference would be that they would continue on that basis unless the parties expressly or by necessary implications agreed to the contrary. This principle was not excluded by the fact that negotiations had broken down since on the facts the second bout of negotiations should be regarded as a resumption of existing negotiations rather than the commencement of fresh negotiations and in any case even if the negotiations had been fresh there was no reason why they should be regarded as starting on a completely different basis.

Misrepresentation

Walker v Boyle [1982] 1 All ER 634 is one of the most interesting cases to have been decided on s 3 of the Misrepresentation Act 1967, involving as it does the holding as unreasonable of a well-known clause in the National Conditions of Sale. In this case the vendor of a house was asked in a preliminary pre-

contract enquiry whether there were any disputes regarding the boundaries of the property. The vendor entrusted the answering of the enquiries to her estranged husband who answered in the negative. In fact there were boundary disputes but the husband, being a man of dominating views, took the view that there could be no dispute since he was clearly in the right. Clearly this was a misleading answer! In due course the contracts were exchanged on the National Conditions of Sale, condition 17(1) providing that 'no error, mis-statement or omission in any preliminary answer concerning the property . . . shall annul the sale'. In due course the purchaser learnt of the dispute and brought an action claiming rescission and recovery of his deposit. The vendor relied on condition 17(1) as excluding liability for the misleading reply to the preliminary enquiry. Dillon J held that the replies to the preliminary enquiries were not deprived of their quality of being representations of fact by printed riders that 'replies on behalf of the vendor are believed to be correct but accuracy is not guaranteed', and that condition 17(1) did not satisfy the requirements of reasonableness as set out in the amended version of 1967 Act. In coming to this conclusion he was not impressed by the argument that both parties were represented by solicitors and that the clause was a common form wording in a well-known standard form. As to representation by solicitors, there was no evidence that either solicitor had given a moment's thought to condition 17(1), nor could it be thought that condition 17 represented the product of negotiation and compromise between competing forces; indeed its history in the courts shows that it has barely survived hostile interpretation.

Economic duress

Although the decision of the House of Lords in *Universe Tankships of Monrovia v International Transport Workers Federation* [1982] 2 All ER 67 is primarily of interest in the field of labour law, it should be mentioned here, since the case is the first example of explicit recognition by the House of Lords of the existence of the modern doctrine of economic duress. Although the House was deeply divided on the labour law point, the case rests on a shared assumption that there is a doctrine of economic duress which may render a contract voidable because one party has entered into it as a result of economic pressure exercised on him which the law does not regard as legitimate. Useful discussions on the point will be found in the speeches of Lord Diplock, at pp 75–76, and of Lord Scarman at pp 88–89.

Agency

The decision of the Court of Appeal in *Waugh v H B Clifford & Sons* [1982] 1 All ER 1095 contains a very useful discussion of the scope of a solicitor's ostensible authority to bind his client to a compromise and the distinction between ostensible and implied authority. In this case the buyers of two houses brought actions against the builders from whom they had bought the houses, claiming damages for negligence and breach of contract. Negotiations took place between the solicitors for the parties with a view to achieving a comprise under which the builders would buy back the houses at an agreed valuation. The valuers appointed by the parties could not agree on the value

and the solicitors for the buyers wrote to the solicitors for the builders suggesting the appointment of a third valuer. On the 21 May 1980 the builders' solicitors wrote to their clients informing them of this proposal and saying that they would go ahead and agree the name of an independent valuer with the buyers' solicitors unless they received contrary instructions. On 30 May the builders telephoned the solicitors to say that they did not agree to the proposal but this message did not reach the responsible partner until after 6 June. On 6 June the solicitors for the builders agreed with the buyers' solicitors a compromise on the basis of an independent valuation. On the 9 June the builders informed their solicitors that they no longer wished to settle the action and on the 13 June withdrew instructions from them.

The buyers then commenced a second action claiming specific performance of the agreement to buy the houses at the independent valuation as agreed by the parties' solicitors. The defendants argued that the solicitors had no authority to enter into a compromise on these terms. It was clear that the solicitors for the builders had no actual authority, since they had been expressly told not to enter into such a compromise. The Court of Appeal had little difficulty however in holding that the solicitors had apparent authority to reach such a compromise. The apparent authority of a solicitor to compromise in such a situation extended to any matters which were not collateral to the suit and a narrow view should be taken of what matters were collateral. In fact the agreement to rebuy the houses was not collateral at all but central to the issue, and, as the court pointed out, it would be destructive of the efficacy of the settlement of disputes by negotiation between solicitors if the solicitors were constantly put to the proof of their actual authority to effect a compromise. There is an important passage in the judgment of Brightmen LJ at pp 1104–1105 where he discusses the relationship between implied and ostensible authority. It is clear that the solicitor or counsel engaged in an action have some implied authority to compromise a suit, (the solicitors in the present case did not of course, since they had been expressly told not to settle), and also has ostensible authority, vis à vis, the other party. However, Brightman LJ suggested that the scope of the implied authority might well be less extensive than that of the ostensible authority; in other words, that there might be compromises which a solicitor would be exceeding his implied authority in agreeing to, which would nevertheless be within his ostensible authority and his acceptance of which would therefore bind his principal.

Frustration

BP Exploration v Hunt (No. 2) [1982] 1 All ER 925 must have strong claims to be regarded as *the* contract case of 1982, being the first case involving the Law Reform (Frustrated Contracts) Act 1943.

It is convenient that the judgments of the Court of Appeal and, in particular, of Robert Goff J, are reported together with the speeches of the House of Lords, since the only points taken to the House of Lords were narrow ones and the judgment of Robert Goff J will therefore remain a leading exposition of the construction of the Act.

The defendant had received from the Libyan government a concession to explore for and extract oil in the Libyan desert. He entered into an arrangement with the plaintiffs under which he agreed to transfer a half-share in the

concession to them and they agreed to explore, develop and operate the concession at their own expense. If oil was discovered in commercial quantities and exploited the plaintiffs would be able to recover this initial expenditure from the defendant's share of the revenues from the oil. In effect, if all worked well and oil was discovered in commercial quantities, the plaintiffs would recover their exploration costs and thereafter have a half-share in the oil; if oil was not discovered the defendant would not have to bear any part of the cost of exploring for it. This agreement was attractive to the defendant because he did not have the resources or expertise to develop a concession himself; it was attractive to the plaintiffs because they thought there was a good chance of finding oil somewhere in the Libyan desert and the concessions that they had obtained from the Libyan government did not look promising. In fact oil was discovered in very large quantities on the concession and the parties began to exploit the concession, but before all the costs could be recovered by the plaintiffs there was a change of regime in Libya and the plaintiffs, and then later the defendants, were expelled from the country. The Libyan government expropriated the plaintiff's half-share in the concession in December 1971 and the defendants' half-share in 1973. The plaintiffs claimed that the contract was frustrated and that under the Law Reform (Frustrated Contracts) Act 1943 they were entitled to recover. It is clear that the core of the 1943 Act is contained in s 1(2) and (3) which effectively embodies the general principle that there should be recovery where there has been unjust enrichment, arising out of the frustration of a contract. The provisions of the Act are complex however and Robert Goff J's judgment contains a very full exposition and analysis of the problems of construction. There is a particularly valuable analysis of the concept 'a valuable benefit' which is employed in s 1(3). In the House of Lords there was no attempt to challenge the analysis of s 1 in the lower courts and Mr Hunt relied on s 2(3) which provides

> 'where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision, operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court should give effect to the said provision and should only give effect to the foregoing section of this Act to such extent, if any, as appears to the court to be consistent with the said provision'.

It was argued in effect for Mr Hunt that as the plaintiffs had clearly taken the risk that there would be no oil found in the concession they had also taken the political risk of expropriation. The House of Lords had little difficulty however in holding that this conclusion did not follow and that accordingly s 2(3) did not apply.

One should also mention for completeness, *Kodros Shipping Corpn v Empresa Cubana De Fletes* [1982] 3 All ER 350 in which the appellant argued that a time charter-party had been frustrated by the ship being trapped in the Shatt Al-Arab by the outbreak of the Iran/Iraq war. Effectively however the decision turned on whether the charterer was in breach of his obligation as to a 'safe port' and this is discussed in the section on shipping law.

In *Paal Wilson v Partenreederei Hannah Blumenthal* [1982] 1 All ER 197, [1982] 3 All ER 394, Staughton J and the Court of Appeal discussed the

circumstances in which an arbitration agreement could be frustrated by excessive delay in prosecuting an arbitration but as the decision of the Court of Appeal was reversed by the House of Lords in [1983] 1 All ER 34 this case will not be discussed further this year.

A final frustration case of considerable interest is *Chakki v United Yeast* [1982] 2 All ER 446. In this case the appellant was employed by the respondent company as a driver. In August 1980 at the start of his two weeks' annual holiday he was sentenced to eleven months' imprisonment for unlawful wounding. He spent one night in prison but was then released on bail pending an appeal against his sentence. The appeal was heard in Spetember when the sentence was varied to probation, but meanwhile the respondents had engaged another driver to replace the appellant. The appellant claimed that he had been unfairly dismissed. The respondents argued on the other hand that he had not been dismissed at all but that the contract had been frustrated by the sentence of imprisonment. This presented a difficult problem as to the moment at which the doctrine of frustration is to be applied. Clearly, if the initial sentence had been one of probation, there would have been no question of frustration. On the other hand, if the sentence of imprisonment had not been varied, there would have been a very plausible case that a contract of employment of this kind was frustrated.

It is often said that a contract comes to an end immediately the frustrating event takes place. This is certainly so in the sense that frustration does not depend on the election of either of the parties. On the other hand, this doctrine is very difficult to apply where frustration does not arise from a single clear-cut event. So, there have been considerable difficulties in applying the doctrine of frustration to contracts of employment where the employee suffers from a progressive illness which only reveals its full seriousness over a considerable period of time. In the past, this has not been a practically important matter since the employer could usually resolve the matter by terminating the contract by notice, but now that such a termination will often amount to unfair dismissal, the argument that the contract is frustrated may provide a means of sidestepping the question of whether the employee has been unfairly dismissed. In many of these cases, the illness would not justify the finding of frustration on the first day the employee was off work, but there is a natural reluctance to hold that the employee has been dismissed two years later when the employer finally indicates that he would not in any case be willing to have the employee back after such a long illness. It has not proved easy to reconcile the conventional law of contract with the realistic demands of the unfair dismissal legislation. A very similar problem in effect arose in this case. Technically, the employer had a strong argument that the contract was frustrated immediately the sentence of imprisonment was imposed but it is not surprising that the Employment Appeal Tribunal were unwilling to accept this and held that the contract was not frustrated immediately on that date, especially as the employee was about to start his annual holiday so that the employers had time to consider the matter and decide whether to engage a permanent rather than a temporary replacement. The case was therefore remitted to another Industrial Tribunal for reconsideration.

Termination

Percy Bilton v GLC [1982] 2 All ER 623 is an important decision of the House of Lords on the allocation of the risk of the insolvency of a nominated sub-contractor between employer and main contractor under the 1963 JCT form of contract. In this case a building contract was made between employer and main contractor in October 1976, completion to be by January 1979. The employer nominated L as the sub-contractor for mechanical services. In July 1978 L, which was in financial difficulties, withdrew its labour. By this time there had already been extensions of time so that the revised date for completion was March 1979; several subsequent extensions were granted and the final completion date was February 1980. The day before L's withdrawal, the main contractor had called on the employer to nominate another mechanical services sub-contractor. Owing to an abortive re-nomination, there was in fact considerable delay in making an effective nomination and eventually H was nominated in November 1978 and entered into a contract in December 1978 to complete its work by January 1980. The main contractor did not complete by February 1980 and the architect certified that the main contractor ought reasonably to have done so and accordingly the employer deducted liquidated damages from the sums which had been certified as due. The main contractor argued that this was not permissible as the delays were due to the need for renomination. It was agreed that the delay which had taken place could be divided into two periods:—delays caused by L's withdrawal and delays caused by the failure of the employer to renominate promptly. It was agreed that the failure of the employer to renominate promptly did entitle the main contractor to an extension of time, which had in fact been given. The dispute centred on the delays which arose directly from the withdrawal of the nominated sub-contractor. The main contractor argued, relying on the well-known decision of the House of Lords in *NW Regional Hospital Board v Bickerton* [1970] 1 All ER 1039 that this loss also fell on the employer. In *Bickerton* the nominated sub-contractor went into liquidation shortly after being nominated and before effectively starting work. The House of Lords held that the main contractor was neither entitled nor bound to do the nominated sub-contract work and that accordingly the risk that the employer could not renominate a sub-contractor willing to do the sub-contract work within the sub-contract period at the prime cost allocated in the main contract fell on the employer. The House of Lords held that the present case was different. The basic principle was that the main contractor was bound to complete by the agreed completion date and if he failed to do so was liable to liquidated damages. This principle was subject to an exception where the delay was caused by acts or omissions by the employer and to qualification by the express terms of the contract. The express terms of the JCT 1963 contract in clause 23(g) entitle the main contractor to an extension of time for delay caused by the nominated sub-contractor which is outside the main contractor's control, but do not provide for an extension of time because of the withdrawal of the nominated sub-contractor, and delay should not be treated as extending to total withdrawal.

It should be noted that the decision might possibly have been different if the main contractor had adopted a different course of action. Conceivably, he might have elected not to terminate the nominated sub-contract, in which

case perhaps the situation would have continued to have been one of delay. Alternatively, he might have exercised his right of reasonable objection to any nominated sub-contractor who was not willing to contract to do the work by the original sub-contract completion date. In fact, the main contractor had chosen not to do this, presumably on the basis that he expected an extension of time. The main contractor was in fact allowed an extension of time but not one long enough to prevent it being late at the amended completion date.

There have been a whole series of cases over the last ten years, in which the House of Lords has held that an owner may withdraw the ship under a time charter party which provides for cancellation in the event of failure of prompt payment of the hire, even though the failure is entirely technical and causes the owner no damage. In each case the decision of the House of Lords has involved reversal of a decision of the Court of Appeal which has attempted to qualify the owner's right to withdrawal. It appears that a number of time charters now include what has come to be called an 'anti-technicality provision', under which the owner agrees to give 48 hours' notice of his intention to withdraw after failure to make due payment. Two cases involving such clauses have been before the courts this year. In *Afovos Shipping v Pagnan* [1982] 3 All ER 18 an instalment of hire was due on 14 June, and did not reach the owner's bank on that date because of an error by both banks (the owner's bank had continued to list a telex number which was no longer in use but was in use by a completely different company and the charterer's bank having failed to get a reply from the telex number which was still in operation sent in a telex transmission to that number which of course went astray). At 1640 hours on 14 June the owner's agent sent a telex to the charterers 'owners have instructed us that in case we do not receive the hire which is due today, to give characters notice as per clause 31 of the Charter Party for withdrawal of the vessel from their service'. Then at 1920 hours on 18 June, a telex was sent by the owners

> 'Please note that owing to charterer's failure to pay hire due on the 14 June 79 punctually as per the above quoted charter party owners having already given charterers 48 hours' notice under clause of the charter party have now withdrawn vessel from service of charterers, as from 1900 hours London Time 18th June 79'.

(Two of the days between 14 and 18 June did not count as being Saturday and Sunday). The Court of Appeal held that the notice of withdrawal was ineffective. The charterers were not in default until midnight on 14 June, even though the bank was closed at the time when the notice was given (there was evidence that telex transmissions are, in exceptional circumstances, received and acted on after the doors of the bank are closed and it was not established that the bank might not have acted on a telex received at 1640 or shortly afterwards), and this was an application of the general rule that the law does not usually take account of parts of a day. It followed that the notice under the anti-technicality clause was premature. It was also held that the notice was defective since it was not in fact a notice that the money had not been received. Although no particular form of words was necessary, it was not adequate to use a formula which was capable of meaning no more than, that if payment was not later received, the owners intended to withdraw.

In *Italmare Shipping v Ocean Tanker (No 2)* [1982] 3 All ER 273 the owners had not given 48 hours' notice under the anti-technicality clause because the charterers had stated that they were entitled to set off against the hire certain payments and disbursements which were in total more than the amount of hire. The arbitrator held that although the owners had failed to give due notice, the charterers had waived any requirement of notice by making it clear that they were not in event going to pay the hire. Parker J held that this conclusion was wrong. The charterer's telex was no more than an explanation of why the hire had not been paid. Even if it amounted to a declaration that they would not pay, it did not amount to a clear and unequivocal representation that the owners need not give notice under the anti-technicality clause, whether treated as a matter of waiver or of promissory estoppel.

The question of promissory estoppel in relation to termination was also raised in *Societe Italo-Belge Pour Le Commerce v Palm and Vegetable Oils* [1982] 1 All ER 19. In this case the sellers had entered into a contract to sell palm oil to the buyers who had sub-sold. Under the sale contract, the seller was required to declare the ship 'in writing, as soon as possible after vessel's sailing'. The seller did not in fact give such a declaration until more than a month after the ship had sailed. Robert Goff J held that prompt performance of the obligation to declare the ship was of the essence since both parties were in a trade where string contracts were the norm and prompt declaration enabled the buyers to appropriate to one of their sub-buyers. The buyers therefore would have certainly been entitled to terminate for non-declaration. However on receipt of the declaration the buyers had made no protest and had not made any statement purporting to reserve their rights. Indeed they had asked the sellers to hand over documents covering the consignment directly to the sub-buyers. However, two days later the sub-buyers rejected as against the buyers and the buyers then sought to reject on the basis of the late declaration. It might perhaps have been argued on these facts that the buyers had elected not to reject the goods since there was no suggestion that they did not know of their right of rejection at the time of the declaration. However the case was fought on the basis that the buyers were estopped from denying that they had waived their rights. Robert Goff J held that approaching the matter as a question of promissory estoppel the buyer's conduct did amount to representation that they would not enforce their right to reject and although the sellers had acted on this by handing over documents to the sub-buyers, it was not in the circumstances inequitable to allow the buyers to change their minds, since a very short time had elapsed between the date of the representation and reliance on it and although the sellers had relied it was not demonstrated that they had relied to their detriment.

Limitation of actions

In *Re Overmark Smith Warden Ltd* [1982] 3 All ER 513 it was clear that the debts were statute-barred unless the creditors could rely on statements of affairs which had been prepared by directors of the company and submitted to the official receiver. Slade J held that in principle it could not be said that such statements of affairs were incapable of being an acknowledgement of indebtedness within ss 23 and 24 of the Limitation Act 1939, but that the particular statements were in fact not such an acknowledgement as would

help the creditors since they did no more than state the liability of the company to creditors as at 20 August 1971 and could not therefore amount to an admission that the debts were still liabilities of the company as at a later date at which the signatories had signed the documents.

Remedies

Perry v Sidney Phillips [1982] 1 All ER 1005, [1982] 3 All ER 705 concerned the principles to be applied where the plaintiff bought a house relying on a report by a firm of chartered surveyors, the defendants, which turned out to have been negligently prepared. The Court of Appeal held that where the buyer had been led by such a negligent survey to pay more than the property was actually worth, the correct measure of damages was the difference between the actual price and the market value as at the date of purchase together with interest until the damages were paid. Further the plaintiff was entitled to damages for distress and vexation at finding himself in a house which was not the house of his dreams if it was reasonable in all the circumstances for him not to have carried out the repairs. Although the plaintiff had partly failed to carry out the repairs because of his impecuniosity, a substantial reason was the defendant's continued denial of liability. In the face of this denial it was reasonable for the plaintiff to have postponed the repairs until he had the money to pay for them.

In *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397 the plaintiff was a dealer in scrap metal who had purchased a fragmentiser to produce fragmentised scrap steel. The defendant in breach of contract had supplied steel for fragmentation which broke the fragmentiser so that a new rotor had to be purchased. The evidence was that but for this breach of contract the rotor might have been used for a further $3\frac{3}{4}$ years and that in order to continue his business the plaintiff had to buy a new rotor at a cost of £41,500, which he was only able to do by entering into a contract with a finance company at a high rate of interest. The defendants argued that the damages should take account of the fact that the plaintiff was replacing a part worn with a new rotor and should not include compensation for the high rate of interest which the plaintiff was having to pay. Cantley J rejected that argument on the grounds that in the circumstances there being no market in second-hand rotors the plaintiff had been forced to buy a new part and that in the circumstances it was reasonable for him to have incurred high finance charges.

For a further discussion of both cases, see the article on Damages.

In *Astro Exito v Southland Enterprise* [1982] 3 All ER 335 the Court of Appeal held that there was jurisdiction to grant a mandatory injunction by way of interim relief where it appeared just and convenient to do so. In the circumstances the plaintiff buyers were entitled to what was in effect an interim order of specific performance against the buyers because this was crucial in relation to their rights against third party bankers, whose obligations under a letter of credit would lapse if the matter was left simply to go to trial.

Criminal Law and Procedure

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General principles

Coincidence of actus reus and mens rea

See *R v Miller* [1982] 2 All ER 386, affirmed [1983] 1 All ER 978 discussed at p 85, post.

Duress

See *R v Graham* [1982] 1 All ER 801.

Mistake

In *Secretary of State for Trade and Industry v Hart* [1982] 1 All ER 817 the Court of Appeal considered the new offence created by s 13(6) of the Companies Act 1976. The defendant had acted as the auditor of two companies when he was disqualified from so doing by virtue of the fact that he was a director of the companies. Section 13(5) states: 'No person shall act as auditor of a company at a time when he knows that he is disqualified for appointment to that office . . .' The prosecution contended for the view that it was sufficient for a person to know the facts and circumstances of his acting as an auditor whilst a director, and that ignorance of the consequence that this constituted a criminal offence was irrelevant to guilt. The Court of Appeal's rejection of this argument indicates the care with which the maxim *ignorantia juris non excusat* has to be applied. Construing the ordinary meaning of the words in the light of *Sweet v Parsley* [1969] 1 All ER 347 the court clearly placed importance on the presence of the word 'knows' and effectively made knowledge of the relevant law, in particular the element of disqualification, one of the ingredients of the mens rea of the offence. A different result would presumably have been reached if his defence had been that he knew he was disqualified under the Companies Act 1976 from acting as a director, but did not appreciate that this was a criminal offence. Ignorance of the general criminal law would not then be a defence.

The decision in the case naturally follows from the wording of the provision and the principle that there is a presumption of mens rea as to each of the ingredients of an offence. Such a result would not be surprising were it not for the facility with which the courts have sometimes discarded these considerations in their willingness to create offences of strict liability.

Recklessness

See *R v Pigg* [1982] 2 All ER 591 discussed at p 91, post.

Specific offences

Arrest/police powers

See Professor Zellick's article on Police, pp 199 et seq, post.

Coinage

Counterfeiting In *R v Heron* [1982] 1 All ER 993, HL, the House of Lords held that where a person is charged with falsely making or counterfeiting any coin resembling current coin (in the instant case the making of coins resembling half sovereigns) contrary to s 1(1)(a) of the Coinage Offences Act 1936, it is necessary to prove no more than an intent to make the coins in question and it is unnecessary to prove any intent to defraud or deceive.

The case (apart from observations on the construction of consolidating enactments) can have importance only in respect of prosecutions relating to facts arising before the coming into force of the Forgery and Counterfeiting Act 1981. On the facts as they appeared in *Heron* the defendants might now be charged under s 1(2) of the Forgery and Counterfeiting Act with making counterfeit coins 'without lawful authority or excuse'. This would make no substantial difference. In *Heron* it did not appear why the counterfeit coins were made; perhaps they were made to be passed as reproductions or as curios. While the meaning of 'lawful authority and excuse' has never been precisely delineated, it is clear that making counterfeit current coinage as curios or to pass as reproductions would not amount to such authority or excuse; still less would it be an excuse for the defendant to claim that he had no purpose in mind when he made the coins.

Damage to property

Arson Criminal damage (arson when the damage is done by fire) requires an intentional or reckless damaging of property 'belonging to another': Criminal Damage Act 1971, s 1(1). It is clear law that a man cannot commit an offence in damaging or destroying his own property even where his conduct (for example, in destroying a priceless work of art) might be described as wanton. It is equally clear that a man does not commit an offence under the Act in destroying his own property though it is done with a view to committing a fraud, as where he destroys the painting in order to claim under an insurance policy. If it is no offence for the owner to destroy or damage his property, it cannot be an offence for another to destroy or damage it on his instructions and it was so held in *R v Denton* [1982] 1 All ER 65, CA. Denton had set fire to his employer's mill acting on the employer's instructions. 'There is nothing like a good fire', the employer had said, 'for improving the financial circumstances of a company'. In such a case it was not necessary to rely on s 5(2) of the Act which provides that an accused is to be *treated as having* a lawful excuse where he 'believed that the person . . . whom he believed to be entitled to consent to the destruction or damage to the property in question . . .' had done so. That sub-section would be necessary only where there was no lawful excuse but the accused believed that there was. If the owner may lawfully destroy or damage his own property, one who acts on his instructions may also lawfully destroy or damage the property.

The case of *R v Miller* [1982] 2 All ER 386, CA; affirmed [1983] 1 All ER 978, HL, raised an issue of small practical importance but of considerable theoretical interest; the sort of problem more likely to be encountered in the examination hall than the courtroom. Miller, while squatting in someone else's house, lit a cigarette and then lay down on a mattress in one of the rooms. He fell asleep while the cigarette was alight and awoke to find that his cigarette had fallen on the mattress which was then smouldering. He did nothing about this, merely moved to another room where he fell asleep again, and the house caught fire. Fortunately for Miller he was rescued; less fortunately he was charged with arson.

The problem raised (it is a general one and is not confined to arson) is whether a person who causes harm by an act, or omission, done without mens rea (no doubt Miller was negligent but intentional or reckless damage by fire is required as the mens rea for the crime of arson) may be convicted of a crime where he realises that the act or omission is causing harm but decides to let the harmful act run its course.

In some circumstances a person who inadvertently causes another to be placed in a position of danger must, on becoming aware of this danger, take steps to obviate it. A parent who inadvertently causes his child to fall into a stream must take steps to rescue the child, and a deliberate failure to take steps reasonably available would entail liability for murder or manslaughter (according to the parent's mens rea) if death resulted. Indeed a person may be liable for a failure to take action where no conduct of his caused the precipitating event; the parent would be liable had the child accidentally fallen into the stream with no want of care on the parent's part; and a constable is liable if, knowing that A is assaulting B, he walks away leaving B to his fate (*R v Dytham* [1979] 3 All ER 641, CA).

So there are certain situations in which the common law recognises, or a statute imposes, a duty to take positive action to prevent harm or further harm. But so far there has been no recognition of any general duty to intervene to prevent damage, or further damage, to property. Had Miller *not* started the fire, it is clear law that he could not have been convicted of arson even though by taking reasonable steps he might have extinguished the fire or called assistance to prevent it from spreading. The same position obtains even though Miller is a guest in the house or even where he is the owner of it.

But here Miller had by his conduct caused the fire and Miller's conviction for arson was upheld both by the Court of Appeal and the House of Lords. Neither court cast any doubt upon the propositions (i) that a mere omission (apart from the exceptional cases where a duty was recognised or imposed) does not give rise to criminal liability; and (ii) that actus reus and mens rea must normally coincide. Nevertheless the Court of Appeal held that an unintentional act followed by an intentional or reckless omission to rectify it could be regarded in certain circumstances as one act. Those circumstances existed in *Miller* because Miller could have taken steps to extinguish the fire and his deliberate or reckless failure to do so could be regarded as an adoption of the original act.

The decision of the Court of Appeal was affirmed by the House of Lords with a significant modification to the Court of Appeal's reasoning. The House rejected the view that Miller's conduct could be regarded as one act (in effect back-dating his mens rea); a person who accidentally starts a fire is

guilty of arson only when thereafter, intending or being reckless whether the property would be destroyed or damaged by fire, he fails to take steps available to him to extinguish the fire or to take other appropriate measures.

Drugs

The meaning of the word 'fraudulent' in a criminal statute has received exhaustive consideration in the past, but in *A-G's Reference (No 1 of 1981)* [1982] 2 All ER 417 the Court of Appeal considered its application to s 170(2) of the Customs and Excise Management Act 1979. The defendants were charged with being knowingly concerned in a 'fraudulent evasion or attempt at evasion', in that they had imported cannabis by surreptitiously unloading a cargo of the drug from a boat at a time when it was thought no customs officials would be on duty. In fact they were being observed by officers who subsequently pursued and stopped them. The judge at first instance had felt himself constrained by the decision in *R v Borro and Abdullah* [1973] Crim LR 513 to come to the conclusion that use of the word 'fraudulent' meant an accused must in effect practise some form of deceit. This could be by telling lies or deceiving or attempting to deceive the officials. Here the defendants had simply brought the goods ashore and tried to make off with them. The submission of the prosecution was that 'fraudulent' in the section merely required that there be proved the element of dishonesty. In this particular case, what was involved was 'a deliberate intention to break the prohibition contained in the Act . . .'

The Court of Appeal adopted the wider definition of 'fraudulent' illustrated by the case of *R v Williams* [1953] 1 All ER 1068 decided under the Larceny Act 1916. Doubt was cast on the ex tempore judgment in *Borro and Abdullah* in the light of the authorities cited to the court in the present case and subsequent speeches in the House of Lords on the meaning of fraudulent.

The result is no doubt sensible since, as the court observed, it would be absurd if guilt depended upon whether 'a customs officer is met and deceived on the one hand, or simply intentionally avoided on the other'. Further, under the statute what has to be fraudulent is not behaviour towards an official but the evasion of the prohibition, and cases such as *Scott v Comr of Police for the Metropolis* [1974] 3 All ER 1032 had given a very wide ambit to the notion of fraud. The only difficulty with this reasoning, though no longer a point of practical importance, is that it appears to deprive 'fraudulent' in the context of any real meaning. How could an 'evasion' ever be innocent or accidental?

In *R v Boyesen* [1982] 2 All ER 161 the House of Lords considered,

> 'whether the offence of possession of a controlled drug contrary to section 5(2) of the Misuse of Drugs Act 1971 is only proved if the quantity of the drug detected is capable of use'.

The defendant was found to be in possession of 5 mg of cannabis resin; the amount required for a reefer cigarette was estimated by expert evidence to be between 50 and 100 mg. The basis of the defence submission was the Court of Appeal's decision in *R v Carver* [1978] 3 All ER 60 which had laid down a twofold ruling in cases of minute possession. If (1) the quantity is so minute 'as in the light of common sense to amount to nothing' or (2) even if there is

something there, it is not 'in a quantity usable in some manner which the Act was intended to prohibit' the court of Appeal held that there was no offence. The House of Lords expressly overruled the second limb of the Court of Appeal's decision in *Carver*. Even if misuse rather than possession might be said to be the mischief aimed at by the legislation, the House decided that the plain words of the section made clear that possession not usability was what the statute prohibited. The amount possessed by the defendant was 'visible, tangible and measurable' and therefore came within the prohibition. Whether a minute quantity did amount to 'something' was a question of fact for the common sense of the tribunal, and in this respect *Bocking v Roberts* [1973] 3 All ER 962 represented the right approach.

The first limb of the *Carver* test therefore survives the House of Lords' decision. Nevertheless, possession is a concept which involves a mental element, and if an accused is found with a quantity so minute (although of course the same principle applies whatever the quantity) that he does not know he had it, then he clearly does not 'possess' it within the terms of s 5 of the Misuse of Drugs Act 1971. The amount of the drug found upon the accused may still, accordingly, be a relevant factor in determining guilt.

In *R v Dunbar* [1982] 1 All ER 188 the defendant, who was a doctor, obtained a quantity of controlled drugs on his headed notepaper requesting that the drugs be supplied 'for professional purposes'. In fact, he admitted that he wanted the drugs for his own use although there was a conflict of evidence as to whether this was to commit suicide or, as the defendant stated at his trial, to alleviate depression. He was charged, inter alia, under s 5(1) of the Misuse of Drugs Act 1971 and sought to rely on the defence provided by s 7(3) of the Act and reg 10(1) of the Misuse of Drugs Regulations 1973. This enables a doctor lawfully to have in his possession a controlled drug 'for the purpose of acting in his capacity as [a doctor]'. The trial judge ruled that the defence did not apply to a doctor who had ordered drugs on his own authority in order to treat himself; he was not then 'acting in his capacity' as a doctor. The Court of Appeal allowed the defendant's appeal.

Lord Lane CJ pointed out that a man may properly act in his capacity as a doctor in circumstances which have nothing to do with the existence of patients. He may, for example, wish to administer codeine to alleviate pain or sickness in himself or administer morphine after suffering an accident. Accordingly, it was stated that a doctor,

> 'bona fide treating himself in those circumstances, is acting in his capacity as a practitioner, although it is he himself who is receiving the benefit of the drug'.

If the drugs had indeed been required to commit suicide, this could not be described as a bona fide purpose, but whether he was in fact acting in such a capacity was a matter for the jury and the judge's ruling had deprived them of an opportunity to consider the matter.

It seems to follow from this decision that members of other professions who are potentially within the statutory defence, pharmacists, dentists and vetinerary surgeons, would not necessarily find themselves in the same position if administering drugs to themselves. For example, a vet could presumably never be said to be acting in his capacity as a vet if he in fact administered a controlled drug to himself.

Explosives

The defendant in *R v Bouch* [1982] 3 All ER 918 had manufactured 36 petrol bombs in his flat at the time of the civil disturbances in Leeds in July 1981. Not suprisingly, he was charged under s 3(1)(b) of the Explosive Substances Act 1883 with making an explosive substance with intent to endanger life or cause serious injury to property. The defendant appealed on the basis that a petrol bomb did not qualify as an 'explosive substance' within the meaning of the Act. The Court of Appeal held that it did. Such a view was the inevitable outcome of the wide definitions provided for explosives by s 9 of the 1883 Act and s 3 of the Explosives Act 1875. Any other result would have left a surprising lacuna in the law.

The defence counsel's submissions that the result of the decision would be that possessors of cans of petrol in their car boot would find themselves likely to be charged under the Act appear equally ill-founded. Quite apart from having to establish the necessary intent to endanger life, prosecutions cannot be brought under this Act without the fiat of the Attorney-General.

Homicide

Manslaughter Manslaughter by unlawful act continues to spawn difficulties and will no doubt continue to do so until rationality is restored to this area of the law by its abolition.

It is not every unlawful causing of death which will suffice; according to *R v Church* [1965] 2 All ER 72, 76, CCA, for a verdict of manslaughter to follow

> 'the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least the risk of some harm resulting therefrom, albeit not serious harm'.

In *R v Dalby* [1982] 1 All ER 916, CA, Dalby and O'Such were friends and drug addicts. Dalby lawfully obtained on prescription 32 tablets of diconal with an instruction that two were to be taken every four hours. Some of these tablets, probably 12 in all, he gave to O'Such. In Dalby's presence O'Such gave himself an intravenous injection and later that night, though not in Dalby's presence, O'Such had two further injections of an 'unspecified substance'. The following morning O'Such was found asleep on a settee; neither his mother nor Dalby could wake him and he died later that day.

The trial judge directed the jury in accordance with *Church*, that there must be an unlawful and dangerous act which subjected the victim to the risk of harm, albeit not serious harm, and that the act must at least have contributed to the death. The jury convicted Dalby of manslaughter.

Quashing the conviction, the Court of Appeal took the view that it was not the unlawful act, namely the unlawful *supply* of the diconal, which had *caused* O'Such's death. His death was caused by what O'Such did with the diconal which was to translate it to a form in which it was suitable for intravenous injection, which made its use more dangerous, and to take it in an amount which further increased the danger. It is obviously right to require a causal connection between the unlawful act and the death. In a sense the supply was a cause because had it not been supplied O'Such could not have administered it, but this case could properly be regarded as one where the intervention of

the victim (in deciding in what form and amount he would administer the drug) broke the chain of causation.

The court added that for manslaughter by unlawful act, the act must be 'directed at the victim and likely to cause immediate injury, however slight'. This is a puzzling qualification. If a man puts, say, a noxious thing into a tea urn intending that anyone who drinks the tea shall be made sick, he would surely be guilty of manslaughter by unlawful act (causing to be administered a noxious thing: Offences against the Person Act 1861, s 24) if death resulted though he had no particular victim to whom he was directing his act and though the noxious thing took effect some days after the administration.

Obstructing the course of justice

In *R v Murray* [1982] 2 All ER 225 the defendant provided a specimen of blood in accordance with s 9(1) of the Road Traffic Act 1972. As is normal, one half of the specimen was retained by the police, the other half being handed over to the defendant to enable him to have it analysed by an analyst of his own choice. The specimen retained by the police indicated a level of 157 mg of alcohol in 100 ml of blood; the defendant's sample when analysed was found to contain only 47 mg in 100 ml of blood. The defendant's analyst reported this to the defendant's solicitor, who in turn reported it to the relevant authority. As a result of subsequent investigation the defendant was charged with attempting to pervert the course of public justice by adulterating the blood sample. The verdict of the jury indicated that there was undoubtedly an intention to pervert the course of justice but the defendant appealed on the basis that what he had done did not go beyond private action. This contention was supported by the fact that the authorities revealed no conviction for this offence where the defendant had not in some way involved himself directly in affecting the discretion of the prosecuting authority, its witnesses, exhibits, or by interference with witnesses, or the manufacture of false evidence and its introduction into the system of public justice. The Court of Appeal nevertheless affirmed the conviction. In order to sustain a conviction for this offence it had to be shown both that the accused intended to pervert the course of justice and also that what he had done, without more, had a tendency to produce that result. It was quite sufficient that what was done produced the risk, without further conduct on his part, of an injustice without necessarily producing the desired result. Here it 'was a practical certainty' that the result of the adulteration would be an eventual communication to the police of the analyst's finding.

The court understandably relied on cases such as *R v Machin* [1980] 3 All ER 151 where Eveleigh LJ commented,

> 'The gist of the offence is conduct which may lead and is intended to lead to a miscarriage of justice whether or not a miscarriage actually occurs.'

Even if the facts of the present case went somewhat beyond *Machin* and *R v Rowell* [1978] 1 All ER 665 the result is entirely in keeping with the tenor of these authorities. Indeed the whole notion of 'private action' in this context appears somewhat misconceived. The real problem at issue is rather whether such acts are intended to and have a tendency to pervert public justice.

Although the court expressly denies basing its judgment on this argument, the view was also expressed that there was interference with the process of justice by the simple tampering with the sample. If he used the sample the offence was committed; if he repented, he would have disqualified himself from using the sample nevertheless and even this would have been an interference with the process of law in that the defendant in these cases should have the opportunity of putting the evidence of his sample before the court. Although it may be a matter of limited practical importance in view of the court's actual reasoning, this appears to be a less certain basis for conviction. After all, the defendant is not obliged to use the sample at his trial. Can it really be said that the mere act of tampering with the sample, if the matter stops there, really has a tendency to pervert the course of justice?

See also the discussion of *R v Selvage* [1982] 1 All ER 96 in the article on Contempt of Court.

Prison breach

The decision of the Privy Council in *Dillon v The Queen* [1982] 1 All ER 1017 gives a restrictive scope to the presumption of regularity in a criminal trial. The defendant, a police constable, negligently permitted two prisoners to escape from custody. The Crown adduced no evidence of any authority for holding the prisoners in lawful custody but claimed that it was entitled to rely on a presumption to that effect, *omnia praesumuntur rite et sollemniter esse acta donec probetur in contrarium*. The defendant was convicted and appealed both on the applicability of the presumption to the offence and on the provisions of s 16(2) of the Prisons Act of Jamaica. The Privy Council upheld both the appellant's contentions. On its proper construction, s 16(2) of the Prisons Act did not apply. Lord Fraser also said that,

> '... it would be contrary to fundamental principles of law that the onus should be on a prisoner to rebut a presumption that he was lawfully detained, which he could only do by the (notoriously difficult) process of proving a negative.'

Especially in an offence which touched the liberty of the subject there was no room for such a presumption and establishing the legality of the detention was a necessary precondition for making out the offence. As was said, proving this element of the offence is unlikely to be a difficulty for the Crown in a case where such lawful detention does in fact exist.

Public order

The inappropriateness of prosecuting homosexual behaviour in public lavatories by means of a charge under s 5 of the Public Order Act 1936 was raised in *Parkin v Norman; Valentine v Lilley* [1982] 2 All ER 583. In two quite separate incidents the defendant made indecent gestures and masturbated in a public lavatory in the presence of a plain clothes police officer. In the first case the defendant desisted when a third person entered, but in the second case there was no one else present. In each case the defendant appealed against his conviction under s 5 on the grounds, (1) that his conduct did not amount to 'insulting behaviour', and (2) no breach of the peace was likely to be occasioned because it was not likely that either the defendant or the police officer

would cause a breach and there was no likelihood of a third person entering the lavatory, becoming incensed by the defendant's behaviour, and then causing a breach of the peace.

On consideration of (1) the Divisional Court made the point of some academic and practical importance, that s 5 does not require an intention to insult. Further, the conduct did not cease to be insulting simply because no one was in fact insulted. A heterosexual using the lavatory for its proper purpose might have been insulted by the defendant's conduct, since it could be understood as an allegation of homosexuality. This could be regarded as potentially insulting and therefore within the terms of s 5. In relation to (2), however, it was noted that,

> 'the words of the statute are "whereby a breach of the peace is likely to be occasioned" and not "whereby a breach of the peace is liable to be occasioned". This is a penal measure and the courts must take care to see that the former expression it not treated as if it were the latter'.

In the particular circumstances of this case there was no real likelihood of a breach of the peace involving the defendant and the police officer, and it was insufficient that the behaviour may have been liable, as opposed to likely, to lead to a breach of the peace.

The result is that importuning in a public lavatory will often not come within the terms of s 5. This is surely in keeping with the main purposes of the 1936 Act, and it would seem that in many cases an alternative charge would in any event be more appropriate.

Rape

A man is reckless according to *R v Caldwell* [1982] AC 341, [1981] 1 All ER 961, HL, if he creates a serious risk of harm and he either (a) gives no thought to there being any such risk; or (b) recognising that some risk is involved goes on to take it. This definition was advanced in relation to a case of criminal damage but Lord Diplock, delivering the judgment of the majority in that case, considered that it should apply wherever 'reckless' appeared in a modern statute.

Such a modern statute is the Sexual Offences (Amendment) Act 1976. By s 1 of that Act a man commits rape if he has intercourse with a woman who does not in fact consent and at that time he either (a) knows that she does not consent; or (b) is reckless as to whether she consents or not. *R v Pigg* [1982] 2 All ER 591, CA, following *R v Caldwell*, holds that a man is guilty of rape if there is an obvious and serious risk that she is not consenting and he gives no thought to there being any such risk.

The decision, perhaps inevitable in the light of *Caldwell*, underscores the difficulties of the *Caldwell* definition of recklessness. If a man is charged with rape and is asked whether he thought the woman was or was not consenting, it must be a bizarre case in which he can seriously answer, 'Well, now that you mention it, I never gave the matter a thought.'! But if this is his answer he has no defence to the charge if there was an obvious risk that the woman was not consenting. If, on the other hand, he forms the honest view that she is consenting, he cannot be convicted of rape (*Director of Public Prosecutions v Morgan* [1976] AC 182, [1975] 2 All ER 347, HL). Thus a man who considers

whether the woman is consenting and forms the view that she is consenting is to be acquitted however unreasonable his belief; but a man who gives no thought to the matter is accounted reckless and is to be convicted.

Theft

Dishonesty The meaning of 'dishonesty' for the purposes of offences under the Theft Acts 1968 and 1978 was considered by the Court of Appeal in *R v Ghosh* [1982] 2 All ER 689, CA. Admitting that the law was in 'a complicated state' Lord Lane CJ, delivering the judgment of the court, sought to put the law on a clearer footing.

It was held in *Ghosh* that the jury should be directed that D acts dishonestly if (i) his conduct would be regarded as dishonest by the ordinary standards of reasonable men; *and* (ii) the defendant realises that his conduct is so regarded. If (i) and (ii) are satisfied, it matters not that (iii) the defendant himself does not regard his conduct as dishonest. While the issue of dishonesty remains a question of fact for the jury to determine, and juries may on occasion differ on how they believe that ordinary people would regard the conduct in question, the *Ghosh* test provides criteria by which most cases can be simply and satisfactorily resolved.

As to (i) there will be circumstances in which juries may differ on whether particular conduct is dishonest by the standards of ordinary reasonable people. Opinions do differ on the circumstances in which it is dishonest to take money from another intending to repay at a later date. The issue is affected by such factors as the amount involved, whether the taking was open or clandestine, whether the owner had expressly forbidden the taking and so on.

As to (ii) the defendant will usually be aware of the community standard but cases may arise where he is genuinely unaware of them. While it is dishonest to travel on buses without payment, the court in *Ghosh* said that a person who came from a country where public transport was free, would not be dishonest if he mistakenly believed that public transport was free in this country. This opens the door to the modern Robin Hood or the ardent anti-vivisectionist *but only* if the former believes that people generally think it not dishonest to rob the rich to feed the poor or the latter believes that people generally think it not dishonest to free animals from laboratories. People who hold such outlandish beliefs about the community standard must be highly exceptional so the door is open by the merest crack.

Prior cases to the extent that they are inconsistent with *Ghosh* should not be followed. In particular *R v McIvor*, decided only months earlier, [1982] 1 All ER 491, CA, was disapproved.

Property belonging to another: theft and deception in *R v Davies* [1982] 1 All ER 513, CA, two old ladies in a nursing home received cheques, one for £10,000, from their banks representing their savings. The defendant, who was employed to manage the home, induced the ladies to endorse the cheques by signing their names on the back, they thinking there were merely signing a piece of paper. He then paid the £10,000 cheque into his own account. It was held that the defendant was rightly convicted of (i) stealing the cheque from the old lady and (ii) obtaining property from the bank by deception in causing

the bank to pay the cheque by representing that it was endorsed for payment to his account. As to (i) no property in the cheque had passed since the mind of the donor did not go with it (it was strictly a case of *non est factum*) and he had accordingly dishonestly appropriated property belonging to another. As to (ii) the defendant had represented that payment of the cheque to him was authorised when it was not and by that deception had induced the bank to make payment to him.

Handling stolen goods Where a person steals goods it will ordinarily be with a view to some benefit to himself. If, for example, he steals a car he may use it for his own purposes. More likely, however, he will dispose of the stolen goods for cash and it may be assumed that the purchaser (whether he is aware or not of the character of the goods) will derive a benefit from the sale.

It was not, however, the intention of the Criminal Law Revision Committee that a thief should become a handler by disposing for his own benefit of the very goods that he had stolen, and hence s 22 of the 1968 Act requires that for a person to be guilty of handling he must dispose of the goods 'by or for the benefit of another'. The drafting of s 22 was, perhaps, somewhat unfortunate and in *R v Bloxham* the Court of Appeal held ([1981] 2 All ER 647, CA) that a person who stole a car was properly convicted of handling when he sold the car to an innocent purchaser who derived a 'benefit' from his use of the car. Fortunately, the House of Lords held ([1982] 1 All ER 582) that s 22 was to be interpreted in accordance with the intentions of the CLRC and quashed Bloxham's conviction. The Theft Act 1968 strives to maintain a distinction between thieves and handlers and a thief is not to attract the heavier penalties applicable to handlers by disposing of stolen goods for his own benefit. It can make no difference that the person acquiring the goods from the thief is or is not aware of the stolen character of the goods.

This is not to say that a thief can never become a handler of the goods that he steals but he can do so only where their disposal is done to benefit another and that benefit is not merely a consequential result of the thief benefiting himself.

Handling is widely defined in s 22, extending not merely to receiving stolen goods but also to assisting in their retention, removal, realisation or disposal or even arranging to do one of these things. It does not however extend merely to using goods which are known to be stolen. So it was held in *R v Kanwar* [1982] 2 All ER 528, CA, that a wife did not assist her husband in the retention of stolen goods which he brought home. But in *Kanwar* the wife's conduct went beyond mere use of the goods. When police officers entered the house with a search warrant she told lies about the provenance of the goods, claiming that various items had not been stolen and had been purchased by her. It was held that she was rightly convicted of assisting her husband in the retention of the goods; assistance required conduct but such conduct might be verbal.

Threats to kill

By s 16 of the Offences against the Person Act 1861 (as substituted by Sch 12 of the Criminal Law Act 1977)—

> 'A person who without lawful excuse makes to another a threat, intending that the other would fear it would be carried out, to kill that other or a third party shall be guilty of an offence . . .'

In *R v Cousins* [1982] 2 All ER 115, CA, the defendant admitted he had made a threat to William Read that he would kill Kelly Read, William's son, but explained the threat as being made to deter Kelly Read from attacking the defendant or members of his family. Following a serious assault on William Read, the defendant had heard that Kelly Read believed that the defendant had been involved in the attack on his father and was out to get revenge. It was held that the trial judge was wrong to withdraw the issue of lawful excuse from the jury on the grounds that the defendant's life was not in immediate danger. If force may be lawfully used in self defence, so a person may in self defence threaten force in order to forestall an attack provided it is reasonable in the circumstances to make the threat. In such cases it would often be desirable to point out that a threat to kill might be justifiable where an actual killing would not; to cause fear of death might be reasonable in the circumstances where killing would be quite unreasonable.

Criminal procedure

Bail

In *R v Vernege* [1982] 1 All ER 403 the Court of Appeal gave guidance to magistrates on the question of bail in cases of committal on a charge of murder. In deciding whether or not to grant bail it was suggested that the court should have regard to the desirability, in the accused's own interests, of remanding the accused in custody for a period long enough for medical reports to be made. Once this has been done, the accused may then apply for bail to the Crown Court.

The reasoning by the Court of Appeal is not entirely free from difficulty, but the situation has since been covered by statute. Section 34 of the Mental Health (Amendment) Act 1982 amends s 3(6) of the Bail Act 1976. In the absence of satisfactory reports on his mental condition, the court must impose a condition that the accused undergo examination by two medical practitioners for the purpose of preparing medical reports. This provision comes into effect on 30 September 1983.

Case stated

A single judge has jurisdiction, it was decided in *Devlin v F* [1982] 2 All ER 450, to deal with an application to extend the time within which to lodge a case stated by a magistrates' court in a criminal case. Leave should be granted if the case raised a genuine point of law which needed to be resolved in the interests of the administration of justice. Any prejudice which the accused might suffer could be dealt with by the Divisional Court when hearing the appeal itself.

Costs

Two cases have elucidated different aspects of a magistrates' court's power to award costs in criminal matters. In *R v Tottenham Justices, ex p Joshi* [1982] 2 All ER 507, the defendant pleaded guilty by post to 37 breaches of the Food Hygiene (General) Regulations 1970. Neither the defendant nor the prosecuting local authority was legally represented. The magistrates imposed a total of £975 in fines but also made an order for costs against the defendant for £575. The fine was reduced on appeal to the Crown Court but, because there is no appeal to this court on costs in these circumstances, a further appeal was made to the Divisional Court who quashed the order as to costs. The court noted that review was possible where magistrates had exercised their discretion under s 2(2) of the Costs in Criminal Cases Act 1973 if the order was so far outside the normal limits as to amount to a misdirection in law. Here the magistrates had erred in that: (1) it was inappropriate to have used the scale of legal aid costs in a case where neither party was legally represented, and (2) it was wrong to take the costs incurred in respect of one offence and then multiply it by the number of offences in order to arrive at a figure. The proper consideration was: what sum of money would reimburse the local authority for its time and trouble? Here the environmental health inspectorate staff were carrying out their duty and made two visits, the longest of which lasted an hour. Under the circumstances, the smallness of the amount in issue justified quashing the order altogether.

In *Bunston v Rawlings* [1982] 2 All ER 697 the magistrates wished to make an order for costs against the prosecutor after an information laid against the defendant had been dismissed. Because they could not assess the defendant's costs at the hearing, a purported order was made under s 2(1) of the Costs in Criminal Cases Act 1973 that the defendant's costs be taxed by their clerk and paid by the prosecutor. The Divisional Court held that the magistrates were not entitled to delegate their duties in this way to their clerk. The proper course in such a case was to adjourn the matter to enable their clerk to make enquiries. The information should then be communicated to the parties and laid before the magistrates so that an opportunity for making representations to the bench could be given before a determination was finally made.

Further guidance in this area has been given by the *Practice Note* [1982] 3 All ER 1152 concerning the dismissal of an information for an indictable offence, a determination not to commit the accused for trial, or a decision not to proceed with an information. In these cases an award of costs should normally be made unless there are positive reasons for not doing so. Examples of how a court should exercise its discretion include: (a) where the prosecution has acted spitefully or without reasonable cause, the prosecutor should pay the defendant's costs under s 2 of the 1973 Act, and if it is necessary to protect the defendant, make an order for costs out of central funds as well; (b) where the defendant's own conduct has brought suspicion on himself, he should pay his own costs; (c) where the defendant is acquitted on a technicality without merit he should again be left to pay his costs; and (d) where the defendant is acquitted on one charge but convicted on another the court should weigh up the relative importance of the two charges and the conduct of the parties generally before making an order.

Crown Court

A problem arose in *R v Hall* [1982] 1 All ER 75 over the transitional provisions of the Magistrates' Court Act 1980. The difficulty is unlikely to arise again, but the case remains of interest in that the Court of Appeal decided that a committal takes place when the committing justices tell a defendant that he is to be committed for trial. The committal certificate sent to the Crown Court did not therefore itself constitute the committal.

In *Shaw v Hamilton* [1982] 2 All ER 718 the Divisional Court made the point that an appeal against a bind over order is unlike either an appeal against conviction or sentence. It was in fact sui generis. Where there was an appeal under s 1(1) of the Magistrates' Courts (Appeals from Binding Over Orders) Act 1965 to the Crown Court it was by way of a rehearing. Unless the appellant admits the evidence before the magistrates, the evidence had to be strictly proved in the Crown Court by sworn evidence which could be cross-examined.

Director of Public Prosecutions

The difficulty of challenging the discretion to prosecute of the DPP or the Attorney-General was again made clear in *Raymond v A-G* [1982] 2 All ER 487. The Director decided to 'undertake . . . the conduct' of proceedings pursuant to the power conferred on him by s 4 of the Prosecution of Offences Act 1979, and offered no evidence against the accused. The private prosecutor, having failed to get an order of mandamus from the Divisional Court, brought an action seeking declarations, an injunction and damages for the Director's alleged unlawful failure to proceed against the defendant. The Court of Appeal held that it was within the Director's powers to intervene in a prosecution for the purpose of aborting it. Unless the decision was 'manifestly such that it could not be honestly and reasonably arrived at it cannot . . . be impugned'.

The right of private prosecution is thus somewhat more precarious than constitutional writers sometimes suggest (and see, Royal Commission on Criminal Procedure (Cmnd 8092) paras 7.46–7.51). It has of course long been the case that the Attorney-General may enter a nolle prosequi to stop a prosecution. The protection against abuse in such cases is political rather than legal in that the Director's duties are carried out under the superintendence of the Attorney General who is in turn answerable to Parliament.

Drugs

In *R v Whitehead* [1982] 3 All ER 96 the appellants were charged with conspiracy to evade the prohibition imposed by s 3(1)(a) of the Misuse of Drugs Act 1971, contrary to s 1(1) of the Criminal Law Act 1977. On appeal, they alleged that s 3(1)(a) of the 1971 Act did not itself create an offence. The 'underlying offence' for the purpose of s 1 of the Criminal Law Act 1977 was fraudulent evasion under s 304 of the Customs and Excise Act 1952 for which an order of the Commissioners of Customs and Excise was required by s 281(1) of that Act before proceedings could be instituted. No order had been obtained. The appellants further contended that s 4(3) of the 1977 Act had not been complied with.

The Court of Appeal applied the reasoning in *R v Menocal* [1978] 3 All ER 961, distinguished *R v Williams* [1971] 2 All ER 444, and dismissed the appeal. Where the charge was laid under s 3(1)(a) of the 1971 Act the underlying offence arose from the combined effect of that section and s 304 of the 1952 Act. Accordingly, the offence could be charged as arising under either Act without excluding the other. Section 281(1) of the 1952 Act did therefore apply to the conspiracy charged by virtue of s 4(3) of the 1977 Act. However s 281(1) had to be read in the light of the exception provided in s 281(4). This stated that an order was not required if the accused had been detained for conspiracy to commit a customs offence. Since they had been so detained, the order of the Commissioners was not required.

The court suggested that it was desirable, although not mandatory, that an offence of evading the prohibition on the importation of a controlled drug should be charged under both the Misuse of Drugs Act 1971 and what is now the Customs and Excise Management Act 1979. It was also stated that s 4(3) of the 1977 Act confers authority on the Commissioners to make an order to institute conspiracy proceedings for an offence under the Customs and Excise Acts.

European Economic Community

The power of a magistrates' court to refer a question to the Court of Justice of the European Communities under art 177 of the EEC Treaty was examined in *R v Plymouth Justices, ex p Rogers* [1982] 2 All ER 175. The difficulty arose because the magistrates wished to make a referral notwithstanding that there remained an unresolved question of fact which, if it were decided in the defendant's favour, would have made further consideration of EEC law irrelevant. The Divisional Court indicated that a wide interpretation should be given to the word 'necessary' in art 177. Accordingly, if magistrates, or a higher tribunal, took the view that a decision by the CJEC was necessary to enable it to give judgment it could make a reference even though all the facts had not been determined. Normally, however, it was desirable to ensure first that they were satisfied there could not be an acquittal on the facts, and then to decide any question of EEC law themselves. If they were wrong, appeal could be made to a higher court which was a more suitable forum to consider making a reference. Although magistrates' courts should exercise considerable caution before referring a question to the CJEC, it was correct to do so in this case. A question of fact was still technically open, but in the circumstances of this case any such finding in favour of the defendant would have been perverse.

Evidence

For discussion of the cases on criminal evidence see the article by Mr Zuckerman on Evidence, pp 126 et seq, post.

Extradition

See Professor Zellick's article on Extradition, pp 142 et seq, post.

Fraud/perjury

The facts of *R v Crown Court at Wolverhampton ex p Crofts* [1982] 3 All ER 702 were unusual and gave rise to a novel point on the availability of certiorari. The defendant, who did not appear at the magistrates' court to answer the charge, was convicted of a driving offence on the uncontroverted evidence of the prosecution. He appealed to the Crown Court, at which he gave evidence for which he was subsequently convicted of perjury, on the grounds that he was not driving at the time and as a result his conviction was quashed. Thereafter the prosecution sought an order of certiorari to set aside the decision of the Crown Court on the basis that it had been obtained by perjured evidence. The Divisional Court granted the order. If there was a conflict, it was said, between the principle of double jeopardy and the principle that a court should quash the decision of an inferior court obtained by fraud, the former principle should prevail. In this case, however, distinguishing *R v Simpson* [1914] 1 KB 66, no conflict arose. Quashing the Crown Court's decision did not put the defendant in peril of conviction twice because the outcome was that he remained convicted as a result of the first and only occasion on which he was put in peril of conviction.

Jurisdiction

The important case of *R v Gateshead Justices ex p Tesco Stores Ltd* [1981] 1 All ER 1027 was partly overruled by the decision of the House of Lords in *Hill v Anderton* [1982] 2 All ER 963. The question which concerned the House was, what constitutes a laying of an information for the purposes of (what is now) s 127 of the Magistrates' Courts Act 1980? It was decided that a distinction had to be drawn between ministerial and judicial functions of magistrates' courts, and it was this distinction which the Divisional Court in the *Gateshead* case had confused. The acts of making a complaint or the laying of an information before a justice of the peace or the clerk to the justices was a ministerial act and no objection could be taken to the delegation of this function to an appropriate subordinate authority. Accordingly, once the information has been received at the office of the clerk to the justices, it has been laid for the purposes of s 127. It is not necessary for the information to be personally received by the magistrate or the clerk to the justices. It is different if a summons or warrant is required after the making of a complaint since this is a judicial function which must be carried out by the magistrate or clerk and cannot be delegated. Although it was not necessary for the House to decide the position as regards oral complaints, it was stated that, as a matter of prudence, these should be addressed to the justice of the peace or clerk in person.

Jury

The care with which communications between the court and the jury should be treated was noted in *R v Lamb* (1974) 59 Cr App R 196 and reinforced by the decision in *R v Townsend* [1982] 1 All ER 509. After less than two hours had elapsed the jury sent a note via the jury bailiff stating that there was an 8–4 majority in favour of acquittal. The judge responded by sending back a

message telling them to continue their deliberations until a unanimous verdict was reached. The defence were not informed of these communications until after the jury had returned with a verdict of guilty. The Court of Appeal allowed the defendant's appeal accepting that this had been a material irregularity in the conduct of the trial. The proper course in such a case is to call back the jury into court in the presence of the defendant and defence counsel and indicate, without disclosing its precise contents, that a note had been received showing that there was a division of opinion. The judge should then tell them that a majority verdict was not possible at that stage and that they should retire in a further attempt to reach a unanimous verdict.

Matters went a stage further in *R v Rose* [1982] 2 All ER 731. After the jury had retired, the judge privately sent messages to the jury through the clerk imposing a time limit within which he required them to reach a majority verdict. It was not surprising that the defendants appealed against their conviction on the basis that improper pressure had been applied to the jury, and that the Court of Appeal held that there had been a material irregularity and the convictions must be quashed. The Crown further appealed, however, to the House of Lords contending that a new trial ought to have been ordered.

The House of Lords considered that the restricted power to order a new trial under s 7 of the Criminal Appeal Act 1968 was inconsistent with the coexistence of any general power to order a new trial by a writ of *venire de novo*. The trial in this case had been validly commenced and, although there had been a material irregularity, there had followed an unequivocal verdict of guilty. Under these circumstances the Court of Appeal had no jurisdiction to issue a writ of *venire de novo*. It was required to quash the conviction only. Although the analysis of the existing law by the House of Lords can probably not be faulted, the decision prompts speculation as to whether legislative intervention might not be appropriate in order to give the Court of Appeal power to order a new trial in such cases.

The problem of what is properly within the province of the jury was considered in *R v Goldstein* [1982] 3 All ER 53 and this decision was subsequently affirmed by the House of Lords [1983] 1 All ER 434. The issue of whether import restrictions are justified within art 36 of the EEC Treaty is a question regarding the meaning of the EEC Treaty which, by virtue of s 3(1) of the European Communities Act 1972, is to be treated as a question of law. It is therefore an issue which may properly be heard by the judge in the absence of the jury. This is hardly surprising when one considers that the issue at stake was whether a crime existed or not under these circumstances. Such matters should normally be raised on a motion to quash the indictment before arraignment.

The case of *R v Pigg* [1982] 2 All ER 591 involved an appeal both as to the meaning of 'reckless' (see p 91 ante) and on a point relating to majority verdicts. This latter part of the Court of Appeal's decision was subsequently reversed by the House of Lords [1983] 1 All ER 56 in a decision which rescued the law from what would otherwise have been an absurd technicality. The issue arose over the requirements of s 17(3) of the Juries Act 1974 which states that a majority verdict should not be accepted unless the foreman states in open court, 'the number of jurors who respectively agreed to and dissented from the verdict'. The clerk of the court in this case asked the foreman how

many jurors agreed on the verdict and how many dissented. The foreman said, 'Ten agreed', to which the clerk replied, 'Ten agreed to two of you'. The judge then accepted this verdict. The Court of Appeal, with apparent reluctance, held that the verdict was rendered void by the foreman's failure to comply with the mandatory requirements of s 17(3) and state in open court the number of jurors who had dissented. The House of Lords, without denying the mandatory character of the provision, decided that the precise form of words used did not constitute an essential part of the provision's requirement. All that was necessary was that the form of words used made it clear to the ordinary person how the jury was divided. The answer in this case was inevitable and obvious once it had been said that ten out of twelve jurors agreed on the verdict.

Libel

In *Desmond v Thorne* [1982] 3 All ER 268 Taylor J, adopting the approach of Wien J in *Goldsmith v Pressdram Ltd* [1977] 2 All ER 557, held that when exercising the discretion to grant leave to commence a prosecution for criminal libel under s 8 of the Law of Libel Amendment Act 1888, a judge was required to consider all the circumstances. He was not confined to considering only the evidence adduced by the applicant but could also take into account a proposed plea of justification by the newspaper. Considering the whole of the evidence in this case, the judge came to the conclusion that the application should be refused.

Sentencing

The cases on sentencing are reviewed by Professor Zellick in the article on Sentencing, pp 235 et seq, post.

Summary trial

Conflicting views had been expressed before the decision of the House of Lords in *Re Daley* [1982] 2 All ER 974 on the issue of the availability of jury trial to an accused who, although under 17 at the time of the offence, attained that age in the course of the proceedings. The case indicates that the critical date is that on which the court decides upon the mode of trial, rather than his first appearance before the court. Accordingly, where an accused person is charged with an offence triable either way, he may elect trial by jury if he has attained the age of 17 at any time before he appears before the court which decides the issue of mode of trial.

Time

The offence under s 24(1)(b)(i) of the Immigration Act 1971 of knowingly remaining beyond the time limited for leave to remain is not a continuing offence. Consequently in *Grant v Borg* [1982] 2 All ER 257 the House of Lords decided that the offence could only be committed the day after leave to remain had expired, not thereafter. Since an information had not been preferred against the appellant within three years of that date the prosecution was time-barred.

Although delay in bringing criminal proceedings could itself render proceedings vexatious and an abuse of the process of the court, the Divisional Court in *R v Grays Justices, ex p Graham* [1982] 3 All ER 653 held that it would not normally prohibit further prosecution of the proceedings. If, in addition to delay, there was some element of mala fides or abuse of the process of the court, an order of prohibition might be made. Here the two-year delay between the alleged commission of the offences and the renewed prosecution was not under the circumstances vexatious and an abuse of the process of the court.

Trial

It is a situation which seems unlikely to be a frequent problem in practice, but it has long been established that a plea of guilty to an offence does not necessarily preclude an appeal against conviction, *R v Forde* [1923] All ER Rep 477. Such a situation arose in *R v Phillips* [1982] 1 All ER 245. The defendant had agreed to plead guilty to one lesser alternative offence in the indictment against him and to enter a not guilty plea to another count. This state of affairs had apparently been accepted by the prosecution. At the trial, the defendant mistakenly pleaded guilty to all the counts, and was accordingly sentenced on this basis. The Court of Appeal quashed the convictions on the two counts on which he had intended to plead not guilty. The appellant in this case had been so confused at the time of his pleas that he did not at the time appreciate the nature of the charges and had not intended to plead guilty to them.

Vagrancy

Although the point is now likely to be of limited practical importance, it is to be noted that the decision of the House of Lords in *Commissioner of the Police of the Metropolis v Simeon* [1982] 2 All ER 813, which arose out of the abolition by the Criminal Attempts Act 1981 of s 4 of the Vagrancy Act 1824, was that the 1981 Act did not have retrospective effect. Accordingly, the institution or continuation of legal proceedings in respect of offences alleged to have been committed before the date of the repeal was not affected.

Damages

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Personal injuries cases

In *Pickett v British Rail Engineering Ltd* [1979] 1 All ER 774 and in *Gammell v Wilson* [1981] 1 All ER 578 the House of Lords decided that the plaintiff in a personal injury case may sue for loss of future earnings not only during the years he is expected to live, but also for the working years he would have lived had the accident not reduced his expectation of life. In *Gammell v Wilson* Lord Edmund Davies said (at p 588) that any assessment of damages for lost earnings during the 'lost years' is 'at best speculative, usually pure guesswork, and where there is any basis for making a calculation such a basis is frequently unreal'. A series of first-instance decisions reported in [1982] All ER show how right he was. The judges have been doing their best, however, and a fairly consistent pattern is developing. In *Benson v Biggs Wall & Co Ltd* [1982] 3 All ER 300, *Clay v Pooler* [1982] 3 All ER 570 and *Harris v Empress Motors Ltd* [1982] 3 All ER 306 the problem involved estimable family men in regular employment, who, when not engaged in 'occasional social drinking', had previously applied their entire incomes to domestic purposes: food, clothes, mortgages, furniture, cars (family saloon model), freezers and DIY. In these cases, following dicta in *Gammell* and *Pickett*, the judges accepted that the figure needed was the man's net income, minus his 'living expenses'. And in the case of these good family men, who spent virtually nothing on themselves alone, and whose income was just about the same as the total family expenditure, the man's living expenses could only be assessed in round figures as a proportion of the household expenses as a whole: about 25% in the two cases where the man was the breadwinner in a family of four, and about 30% where he was the breadwinner in a family of three. The 'multiplicand', therefore, was 75% of his previous net income in the first two cases, and 70% in the third.

In *White v London Transport Executive* [1982] 1 All ER 410, however, Webster J had to deal with a 'lost years' claim involving a previously gay (*stricto sensu*) bachelor who lived at home, and who, after paying his mother for his keep, regularly spent the rest of his income on clothes, records, beer, women, and presents for his family and his illegitimate child. What were his 'living expenses'? Webster J took these to be what he spent on 'housing, heating, food, clothing, necessary travelling and insurances and things of that kind, if relevant.' The income for the 'lost years', therefore, was the balance of his income which he spent on his various pursuits. Whilst he lived at home, this was about one-third of what he earnt; but it would be less after a few years, because by then he would have left home, and thereafter his board and lodging would cost him more. Thus far, *White's* case is consistent with the others. But at the end of the judgment an inconsistency appears. Looking to the time when P would have left home, Webster J foresaw that he would

eventually acquire and maintain a family—and treated what he would spend on maintaining them as part of his 'living expenses'. On this calculation, the plaintiffs in *Benson, Harris* and *Clay* would have recovered virtually nothing for the 'lost years', whereas, as we have seen, the judges there declined to treat what P spent on maintaining his dependants as part of his living expenses, and so awarded a substantial sum.

Which is the correct approach? The award of damages for lost earnings during the 'lost years' was invented by the House of Lords in *Pickett* precisely to prevent P's dependant's being left high and dry when they had no claim under the Fatal Accidents Act because he had been, not killed, but merely maimed and left a wreck with a greatly reduced expectation of life. Obviously, to deduct from the award what P would have spent on supporting them is to defeat the object of the exercise. It is respectfully submitted that *Benson, Harris* and *Clay* are right, and that on this point the decision in *White* is wrong.

In all of these cases the injured man was dead, and the judge also had to sort out the relationship between the 'lost years' claim due to his estate, and his dependants' claims under the Fatal Accidents Act. On this, the decisions are now of purely historical interest, because the Administration of Justice Act 1982 s 4(2) wipes out the claim for lost income during the 'lost years' where P is dead, and the courts will therefore no longer be faced with such a claim in conjunction with one brought under the Fatal Accidents Act. As authorities on the calculation of damages for lost earnings during the 'lost years' these cases remain relevant, however, because where P is still alive and suing in person such a claim is still possible.

In *Robertson v Turnbull* (1981) 131 NLJ 1211 the House of Lords dismissed, apparently with amazement, the notion that the dependants of someone unlawfully injured but not killed could claim in their own right for loss of support at common law. When one sees the knots which the courts have tied themselves up in to provide for them indirectly by inflating the claims open to the person actually hurt, one feels it is a pity that *Robertson v Turnbull* was not decided the other way, and about 50 years ago.

Another problem arising from *Pickett v British Rail Engineering Ltd* was discussed in *Birkett v Hayes* [1982] 2 All ER 710: the rate of interest payable on damages for personal injury. Before *Pickett*, the courts gave interest from the date of the writ in respect of certain pecuniary losses, but gave no interest on the sums awarded for non-pecuniary losses such as pain and suffering and loss of amenity. Because of inflation, the sums awarded for the non-pecuniary losses are continually increasing. P always gets them according to the tarriff prevailing at the time of the trial. Therefore, reasoned the Court of Appeal in *Cookson v Knowles* [1977] 2 All ER 820, 'the plaintiff. . . stands to gain by the delay in bringing the case to trial. He ought not to gain still more by having interest from the date of service of the writ.' In *Pickett*, the House of Lords disapproved of this. Said Lord Scarman,

> 'It is assumed that because the award of damages made at trial is greater, in monetary terms, than it would have been had damages been assessed at date of service of writ, the award is greater in terms of real value. There is here a complete non sequitur. The cash awarded is more, because the value of cash, ie its purchasing power, has diminished' ([1979] 1 All ER at p 800).

Therefore, he concluded, P should have interest on these damages, having been owed them since service of the writ, and having had nothing in real terms for being kept waiting. In *Birkett v Hayes* the Court of Appeal (Lord Denning MR, Eveleigh and Watkins LJJ) refused to accept this. Lord Denning, quoting the Pearson Commission, said that damages for non-pecuniary losses were really no more than conventional sums, and were awarded, what is more, as 'compensation *for the past*, and also *for the future* pain, suffering and loss of amenities.' Furthermore, even accepting the argument about inflation and purchasing power, P should then get interest only on the figure which would have been awarded at the time of the writ, not on what the court eventually awards at the trial, which would give him too much. In *Pickett*, he added, the House of Lords also overlooked the fact that if D had paid up at the time of the writ, P would have had to pay tax on the interest which the damages would have earnt him, whereas damages plus an interest component are paid to him tax-free. And finally, according to Eveleigh LJ, it was unfair to accuse D of keeping P out of his money as far as damages for non-pecuniary losses were concerned, because at the time of the writ P usually had no idea how much to ask for, and D therefore had no idea what he ought to pay. Being bound by the House of Lords ruling in *Pickett*, the Court of Appeal had to live with what it strongly felt to be a bad rule; but it made the best of a bad job by fixing the interest rate at an extremely low 2%, and by pointing out that the court could order interest from a date *after* service of the writ if it thought it unreasonable for D to have paid up then. A sensible decision, surely; but one which represents what might be called the *mitiori sensu* approach to the doctrine of precedent!

The final case on damages for personal injury and death to note is *Lincoln v Hayman* [1982] 2 All ER 819. Here, the Court of Appeal finally resolved the question whether, in awarding P damages for earnings lost up to the time of the trial, account should be taken of any supplementary benefit he has received. This had long been in doubt, and had given rise to a number of conflicting first instance decisions.

The question is by no means easy. On the one hand, there is no question of the possibility of *future* supplementary benefit payments being deducted from damages for *future* loss. The supplementary benefit scheme is a long-stop, available only to those who have no other means of support. There is no possibility of a defendant 'topping it up'. P would only get supplementary benefit in future if D paid him nothing or next to nothing; and if the award of damages took account of the possibility of supplementary benefit the award would be reduced to zero—which would defeat the social purpose of both damages and supplementary benefit. If supplementary benefit must be disregarded for the future, should it not equally be disregarded for the past? Furthermore, supplementary benefit is a non-contributory scheme and is funded by the general taxpayer. Why should he subsidise D permanently whenever he temporarily shoulders what is really D's burden? Especially since, if D can count supplementary benefit against income lost, it makes it in D's interest to delay any payment as long as possible, because the later he pays, the less he has to pay? On the other hand, why should P who receives supplementary benefit between the accident and the trial be entitled to make D pay as if he had not, and so enjoy double recovery at the joint expense of D and of the taxpayer? Especially since, if he may do so, this will strongly

discourage him from bringing the case to trial, because the later he is paid, the more in real terms he will get.

In *Lincoln v Hayman* the Court of Appeal considered all the arguments, and found them finely balanced. In the end it came down in favour of a deduction being made, finding this result not attractive, but less unsatisfactory than the other. Said Waller LJ,

> 'The ideal answer might be that the insurers should get credit for the supplementary benefit but should be obliged to reimburse the Supplementary Benefit Commission for the benefit paid. This, however, cannot be done without legislation.'

Commercial cases

Perry v Sidney Phillips & Son [1982] 3 All ER 705 is a decision of considerable importance to surveyors, and one which will give them a certain amount of comfort.

In 1965, the Court of Appeal (Denning, Morris and Romer LJJ) ruled in *Philips v Ward* [1956] 1 All ER 874 that where P buys a defective house on the strength of a negligent survey the proper measure of damages against the surveyor is the difference between the value of the house as it was, and what P actually paid for it. They said that it was not the cost of doing the necessary repairs, and if by the time of the trial the cost of doing the repairs greatly exceeded the difference in values at the time the house was bought, that was just P's bad luck. In *Perry v Sidney Phillips*, Patrick Bennett QC, sitting as a deputy High Court judge, departed from this, and awarded P the present cost of repairs ([1982] 1 All ER 1005). He did so in the light, inter alia, of *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, a case where D had caused P's building to subside, and the Court of Appeal had awarded P the present-day cost of repair. Then, to make D's cup of happiness overflow, the deputy judge also gave P damages for distress and discomfort already suffered, plus future inconvenience in having to live through the repairs.

Then two things happened. D appealed. And P, who had originally intended to stay in the house and repair it with the damages he hoped to get out of D, took a job elsewhere and sold up. After his change of plan, P no longer sought to maintain the award on the basis of present-day costs of repair—although he did try to argue that the correct measure of damages was now the difference between what he got for the house on selling it, and what it would have been worth in good repair, which in most cases is likely to be the same. The Court of Appeal (Lord Denning MR, Oliver and Kerr LJJ) unanimously rejected this, and said that *Philips v Ward* still applied. So P got only the difference in value between what he paid for the house in 1976, and what it was then worth. The court sweetened the pill a little for him, however, by saying that this sum should bear interest at around 10% per annum from 1976, and by saying that P was entitled to something in addition for his distress and discomfort so far—although obviously not for the inconvenience of the repairs which he would not now have to endure.

Kerr LJ left open the question whether, had P stayed put, he would have been entitled to damages based on the present-day cost of repairs. Lord Denning MR and Oliver LJ, however, were quite clear that he would not. In

their view, the negligent surveyor merely inflicts on his client an economic loss by causing him to pay more for a house than it is actually worth, and the difference between the two values is therefore all that he has to pay, whatever P thereafter does with it. This is quite a logical position to adopt. It contrasts very sharply, however, with the line which the courts have taken with local authorities whose inspectors negligently fail to discover inadequate foundations when they inspect construction sites. Where these are defendants, they are regularly held liable for the cost of repairs; yet, surely, the damage they cause is really no different from that which the negligent surveyor inflicts—and the surveyor is actually paid by the plaintiff to take care.

If D does P a legal wrong, but thereby causes him no damage, P normally gets nominal damages only. This principle is illustrated by the Court of Appeal decision in *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1982] 1 All ER 28. Here D wrongfully asserted a lien on 42 tons of copper which belonged to P. D eventually handed the copper over to P when P obtained summary judgment against him under Order 14, and there followed more leisurely proceedings on the issue of damages. Whilst D detained it, P's load of copper had fallen in value, because the price of copper had fallen; but P never intended to sell the copper, which he wanted to use in the manufacture of cathodes, which was his business. The wrongful detention might have been expected to hold up P's factory for want of materials, but there was no evidence that it had done this. If this had not happened, it might well have been because P had used his own money, or borrowed the bank's money, in order to buy some more copper to keep his factory going; but there was no evidence of this either. The trial judge gave P £3,588 damages for the drop in the value of the copper, and a further £2,800 for overdraft payments. The Court of Appeal, in a judgment delivered by Brandon LJ, gave him £5 nominal damages only.

This decision has been trenchantly criticised by Andrew Tettenborn in an interesting paper in (1982) 132 NLJ 154. The point he makes is that for the court to say 'P has suffered no damage' begs the question 'What is damage?' Damage in law is not necessarily limited to matters of identifiable pecuniary loss. For example, as *Perry v Sidney Phillips* shows, there can be awards in respect of inconvenience and distress; and the person about whom a libel has been published is entitled to substantial damages whether or not he suffers a cash loss, and indeed whether or not anyone believes it. So, Tettenborn argues, a person should be regarded as suffering a loss by merely being deprived of his chattel, whether or not he loses money as a result.

This is a powerful argument. But perhaps there is an answer. Of course, the law *could* recognise the mere deprivation of possession of a chattel a substantial damage—but the question is whether it *ought* to do so. Surely there is only a case for the existence of a head of non-pecuniary loss where it serves some useful purpose. Would an award of substantial damages in such a case as this serve one? Arguably not. It is often forgotten that the tort of wrongful interference with goods serves two distinct purposes. The first is to enable a person to vindicate his property rights. Obviously, if P says in effect 'Give me back my chattel' it is no answer, outside the nursery or the commune, for D to say 'I need it, and it does not hurt you to do without it.' But secondly, even where P has got his chattel back, the tort provides compensation for P for the damage which the invasion of his property rights

has caused him. And where, as in *Brandeis Goldschmidt*, P *has* got his chattel back, it is not immediately obvious—to this commentator at least—why the courts should now treat him as having suffered substantial damage where there is no pecuniary loss. The case is different from *The Mediana* [1900] AC 113, where the House of Lords gave P damages for (inter alia) the loss of use of his light-ship, a non-profit-earning chattel; although he was able to replace it during repairs with a spare he kept in stock for this purpose. The only reason why P in *The Mediana* did not have to hire a replacement light-ship was that he happened to keep a spare. No doubt owning and keeping the spare cost him considerable expense, and presumably if he had been able more cheaply to hire a replacement every time he needed one he would have done just that. So there was a pecuniary element in *The Mediana* in a way in which, on the evidence (or rather absence of evidence) in *Brandeis Goldschmidt* there was not. The fact that in *Brandeis Goldschmidt* a substantial award of damages would have been difficult to assess on any rational basis may perhaps further indicate that it would not have been very rational to make any such award.

On a related matter: if D inflicts on P a wrong which does P a good turn, does the value of the good turn have to be taken into account in assessing damages for the wrong? The answer here must be a vague 'Yes, sometimes, but not always.' If D destroys the building which P was about to demolish in order to redevelop the site, P gets the cost of clearing up the mess but nothing more (*C R Taylor (Wholesale) Ltd v Hepworths Ltd* [1977] 2 All ER 784). On the other hand, if I negligently kill your dog, it is clearly no answer to your claim for me to say that the dog was a gluttonous and stinking creature, and by killing it I have saved you the cost of a large number of tins of dog-food and improved the smell of your house. A real example of a case where the benefit which D accidentally conferred on P fell to be disregarded is *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397.

P owned a very expensive machine for fragmenting scrap metal, the vital part of which was a rotor. The life expectancy of a rotor was about seven years; P's was $3\frac{1}{4}$ years old, and therefore had $3\frac{3}{4}$ years of life ahead of it. In breach of contract, D sent P some scrap metal so hard that it was the rotor, rather than the scrap, which got fragmented. P had to replace the rotor quickly, because his business was at a standstill until he did so. He obtained a new one for £41,500 and fitted it. Then he sought to recover the entire cost from D. D declined to pay. He said 'Thanks to my breach of contract, you now have a rotor with $3\frac{1}{4}$ more years wear in it than you had before. So knock off £19,268, the proportion of the cost of the new rotor which this represents, and I shall pay you the balance.' Cantley J rejected this defence and made D pay the full £41,500.

At first sight this looks surprising. If D damages P's three-year-old car beyond economical repair, P cannot make D pay for the cost of a new one. So how was P entitled to the cost of a brand-new rotor? Because, it seems, there was a crucial finding of fact that it was impossible to obtain a second-hand rotor, and P therefore had no choice but to buy a new one. What is more, not only did he have no choice in the matter, but he did not particularly want the benefit he had no choice but to accept. As Cantley J pointed out, it was quite likely that when the original rotor would have worn out, P would have wanted to replace the entire machine rather than just the rotor, or even that he

might have wished to give up this line of business altogether. With respect, therefore, the decision looks entirely correct.

Bacon v Cooper (Metals) is also in line with various authorities on damage to real property. In *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 All ER 225, the Court of Appeal held that where D burnt down P's ancient factory, and P rebuilt, P was not bound to give D credit for the fact that he had a better factory at the end of the day. And in *The Gazelle* (1844) 2 Wm Rob 279, a similar approach was taken where D sought to argue that P's boat was better after the repairs which D had caused it to need than it had been before the damage. In neither of these cases, it should be noted, had P spent more than the minimum in doing the repairs; but nor, as a result of the absence of a market in second-hand rotors, had Mr Bacon.

Remoteness of damage; novus actus

Knightley v Johns [1982] 1 All ER 851 arose, like many other remoteness cases, from a road accident. Whilst driving through a tunnel which carried the northbound lane of a motorway, D1 carelessly crashed his car near the exit. A police inspector, D4, arrived, and forgot to carry out an instruction to close the other end of the tunnel to oncoming traffic before he did anything else. When the passage of vehicles inches from his posterior reminded him, he sent P, a police motor-cyclist, to ride with siren blaring the wrong way up the tunnel to the mouth, there to close it off: a dangerous manoeuvre, but now the only practicable thing to do in the circumstances. On his way there P was struck and injured by D2 as D2 came round a blind corner in the tunnel, not expecting to find a vehicle coming the wrong way. The trial judge acquitted D2, D4 (the inspector) and D3 (the Chief Constable as his 'employer') of all responsibility, and held D1, the author of the original accident, liable for the injuries suffered by P. The Court of Appeal (Stephenson LJ, Dunn LJ and Sir David Cairns concurring) reversed him. The real cause, they said, was the inspector's negligence in forgetting to close the tunnel, and for this he and the Chief Constable were liable. D2, the second motorist, was not liable for hitting P because, as the judge had found, he was on the facts driving with due care. And D1, the original negligent motorist, was not liable to P because the inspector's negligence was a *novus actus interveniens*.

The facts of the case are unusual, so the decision does not provide the answer to a problem daily before the courts. The result is rather what one would instinctively have expected, and there is nothing revolutionary in the route by which the Court of Appeal reached it, which is orthodox down to the inevitable observation that causation is ultimately a matter of common sense at the end. Nevertheless the case prompts a few thoughts on remoteness of damage and causation.

First, it shows yet again that it is not possible to answer every remoteness problem by asking 'was what happened reasonably foreseeable?' When *The Wagon Mound (No 1)* [1961] 1 All ER 404 was decided, hopes were high that the new reasonable foreseeability test would furnish a clear answer to every case. We now know that it does not—for this reason. Events do not fall neatly into two classes, those which are reasonably foreseeable and those which are not. Many are eminently foreseeable in outline, but quite unforeseeable in detail. *Knightley v Johns* is a good example. It was highly foreseeable that as a

consequence of D1's negligent driving a rescuer would get hurt; but it was not at all foreseeable that he would get hurt by being knocked off his motorcycle yards from the accident when riding up the tunnel the wrong way. The result the reasonable foreseeability test produces therefore depends on how much detail we specify as needing to be foreseeable. And generally, as Stephenson LJ pointed out, the courts ask whether the *result* was foreseeable, and do not trouble about the unforeseeability of the detailed circumstances leading up to it. The difficulty with this broad approach, however, is that it lets in as recoverable consequences which the courts feel instinctively ought to be too remote. So they have to look outside reasonable foreseeability for other means of excluding them.

Knightley v Johns shows us that the means the courts adopt in such a situation are our old friends from pre-*Wagon Mound* days, '*novus actus*' and the directness test. As Lord Reid put it in *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621 at p 1623,

> 'A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee. What can be foreseen depends almost entirely on the facts of the case, and it is often easy to foresee unreasonable conduct or some other novus actus interveniens as being quite likely. But that does not mean that the defender must pay for damage caused by the novus actus.'

It is, of course, impossible to lay down any hard and fast rule as to when human behaviour is or is not a *novus actus*. But, as Stephenson LJ said in *Knightley v Johns*, it is partly a question of how *unlikely* an act it was, and partly a question of how *unreasonable*—ie blameworthy—was the actor. 'Negligent conduct is more likely to break the chain of causation than conduct which is not; positive acts will more easily constitute new causes than inaction.' The inspector's behaviour was both unlikely and blameworthy. So it amounted to a *novus actus*.

Lastly, *Knightley v Johns* illustrates again the courts' continuing sympathy for rescuers as plaintiffs, in which respect they draw no distinction between amateurs and professionals (cf *Salmon v Seafarer's Restaurants* (1982) NLJ 882). It was no answer to P's claim that he willingly assumed the risk, or was guilty of contributory negligence, in that he could have gone more slowly a long way round to the mouth of the tunnel in safety. Anyone who has looked at a few remoteness cases knows that a plaintiff's meritorious behaviour also sometimes induces the courts to operate the rules of remoteness in his favour as well: as in the Canadian case where a father who donated a kidney to his daughter in an attempt to repair the consequences of a doctor's negligent operation was awarded damages against the doctor (*Urbanski v Patel* (1978) 84 DLR (3d) 650). So it may have been relevant to the outcome if not to the reasoning in *Knightley v Johns* that the author of what was held to be a *novus actus interveniens* was identified, solvent, and a party to the action. Had it been otherwise, perhaps his behaviour would not have been regarded as a *novus actus*.

Employment Law

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Introduction

The cases reported in the All England Law Reports in 1982 in the field of employment law provide a salutary reminder that notwithstanding the growing importance of a whole range of statutory employment rights, the common law—and the common law courts—continue to play a vital role in the development of legal principles in this area. Disputes between employers and employees arising out of the contract of employment, between unions and their members, and between unions and employers, are still regulated principally by common law principles.

Termination of employment

Even before the advent of unfair dismissal legislation, certain groups of workers, namely those whose employment was regulated by statute, or who were treated as office holders, were in certain circumstances able to have their purported dismissals treated as void and of no effect. However it has never been entirely clear what are the consequences of treating dismissal as a nullity. The practical difficulties of necessarily treating the dismissal as void for all purposes were revealed in the House of Lords' decision in *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141. The chief constable had dispensed with the services of a probationary constable as a result of certain unfounded allegations which cast doubt on the constable's suitability. The constable was given no opportunity to answer the allegations and all of their Lordships (Lord Hailsham, Lord Fraser, Lord Roskill, Lord Bridge and Lord Brightman) were in no doubt that this was a flagrant breach of natural justice which vitiated the chief constable's decision. However, they found great difficulty in deciding upon the appropriate remedy. The probationary constable had sought an order of certiorari under RSC Ord 53 to quash the chief constable's decision; an order of mandamus directing the chief constable to reinstate him; and a declaration that the decision was illegal, ultra vires and void. He did not seek monetary compensation. (It should be noted that an application under Ord 53 is not always appropriate where a public body is involved: *R v BBC Ex p Lavelle* [1983] 1 All ER 241, and it is sometimes difficult to determine when it is appropriate and when not). Despite expressing much sympathy with the constable for the outrageous treatment meted out to him, their Lordships were not prepared to give him the remedies he sought. Both certiorari and the declaration were considered unsuitable because their Lordships were not clear what consequences would flow from it. The constable had been dismissed some four years earlier with 10 months of his probationary period still to run. As Lord Hailsham rhetorically asked, would the declaration that his dismissal was void mean that he was now a full constable, and would it entitle him to

pension rights or back pay? If the dismissal was void for all purposes, it should logically have these consequences. As Lord Hailsham observed, there is

> 'difficulty in applying the language of "void" and "voidable" . . . to administrative decisions which give rise to practical and legal consequences which cannot be reversed.'

Perhaps more surprisingly the order of mandamus was also refused on the grounds that it might usurp the powers of the chief constable. In the circumstances this may be thought to display both unnecessary reticence and an exaggerated concern with the privileges of the chief constable. Nevertheless the respondent had to be satisfied with a declaration that the chief constable had acted unlawfully and in breach of duty.

A different aspect of the law of termination concerned the Employment Appeal Tribunal in *Chakki v United Glass Co Ltd* [1982] 2 All ER 446. The appellant had been sentenced to imprisonment for eleven months and on the same day the respondents were informed of this fact by his wife. In the event however, he was in prison for only a day. He was released on bail pending his appeal, and that appeal resulted in his being given probation instead of a prison sentence. Nevertheless the employers successfully contended before the industrial tribunal that the contract had been frustrated by the sentence of imprisonment.

On appeal the EAT held that in the light of the Court of Appeal decision in *Hare v Murphy Bros Ltd* [1974] 3 All ER 940 it would have felt obliged to accept that the doctrine of frustration was in principle applicable to cases of imprisonment. In fact this was conceded in any case. But it is surprising that the EAT took this view since only Lord Denning in *Hare*'s case treated the imprisonment as a frustrating event, a fact subsequently appreciated by a different division of the EAT in *Norris v Southampton City Council* [1982] IRLR 141, a case which specifically stated that *Chakki* was therefore of doubtful authority on this point.

However *Chakki* also held that accepting that imprisonment may amount to frustration of the contract, it was not proper automatically to treat the imposition of the sentence as the frustrating event. Whether or not the contract was frustrated had to be determined at the time when it became commercially necessary for the employer to make a decision about the employee's future. This might be some time after the sentence itself is imposed. It was at that stage that the employer had to consider whether the likely absence in all the circumstances frustrated the contract. (For a further discussion of this case see the article on Contract p 78, above).

Implied terms in the contract of employment

Mears v Safecar Security Ltd [1982] 2 All ER 865 is a leading decision on implied terms in the contract of employment. The particular issue arising in that case was what term should be implied into the contract of employment relating to sick pay when there is no express term on the point. But in the course of his judgment in the Court of Appeal, Stephenson LJ, whose judgment was concurred in by O'Connor LJ and Sir Stanley Rees, also discussed two other wider issues: the general principles relating to the

implication of terms into the contract of employment; and the approach which industrial tribunals should adopt when determining what particulars ought to be included in an employee's written statement of the terms of his employment in an application made under s 11 of the Employment Protection (Consolidation) Act 1978.

The facts of the case were simple. The employee began work in July 1978. Nothing was said about any contractual entitlement to sick pay. He was then absent sick from December 1978 to January 1979 and again from March to September 1979. Fellow employees informed him that he would receive no sick pay and he did not seek any. In September 1979 he finally informed the company that he would be unable to carry out his duties and resigned. He then made an application to an industrial tribunal under s 11 of the Employment Protection (Consolidation) Act 1978 requesting the tribunal to determine what particulars, particularly in respect of any sick pay, should have been included in his written particulars. The industrial tribunal held that there was a presumption in favour of an employee being entitled to sick pay, subject to a deduction for any state sickness benefit received, and that the company had not displaced the presumption. The employee's appeal to the Employment Appeal Tribunal was successful and its decision was in turn upheld by the Court of Appeal. Stephenson LJ denied that a court should begin by assuming that there was a presumption in favour of sick pay, and then placing the onus on the employer to bring forward evidence to rebut that presumption. *Orman v Saville Sportswear* [1940] 3 All ER 527 had been wrongly decided. The court should imply a term by considering all the relevant circumstances free from any presumptions. Only if there are no factors pointing either way—which will be wholly exceptional—should the presumption in favour of sick pay come into play.

The analysis of the structure of implied terms in the contract of employment arose in the context of Stephenson LJ giving guidance to industrial tribunals as to how they should determine which particulars ought to be included in the written statement. First, tribunals ought to determine whether there are any orally agreed terms. Obviously since these are express terms they take precedence over implied terms to the contrary. If there is no such agreement, the tribunal must consider what term to imply. Occasionally obligations will be implied by the general law as necessarily arising out of the relationship between an employer and employee. The existence of implied—or perhaps more accurately imposed—terms of this nature has been recognised by the House of Lords in *Lister v Romford Ice* [1957] 1 All ER 125 and more recently in *Liverpool City Council v Irwin* [1976] 2 All ER 39. But as his Lordship emphasised, a term can be implied in this way only if it is a *necessary* incident of the relationship: it is not enough that it would be reasonable to imply it.

In the absence of any such terms, the tribunal must look at all the facts and circumstances in deciding which term to imply. However, they are not limited to considering the particular circumstances existing when the contract was made: they can take account of the subsequent conduct of the parties. Whilst this is inadmissible where a written contract has to be construed (*L Schuler AG v Wickman Machine Tool Sales Ltd* [1973] 2 All ER 39 (HL)), it is permitted where the contract, or the relevant term in dispute, is not written down. As Stephenson LJ commented,

> 'common sense suggests that the subsequent conduct is the best evidence of what they have agreed orally but not reduced to writing, though it is not evidence of what any written terms mean'.

The *Liverpool City Council* case was relied upon in support of this principle. So the conduct of the parties is relevant not merely in determining whether the contract has been varied by custom and practice, but also because it may indicate what were the original contractual obligations of the parties. As Stephenson LJ recognised, this may involve treating a term as implied which would not have been assented to by both parties so as to be implied by the traditional 'officious bystander' test.

Finally, his Lordship expressed the view, obiter, that if none of the above tests will supply the missing term, an industrial tribunal still has a statutory duty to find what the term is and to state it as part of the particulars, and in these circumstances it will simply have to decide

> 'which term fits in best with all the circumstances of the case, which may be getting near to deciding what is a reasonable term . . .'

In exercising this rule-making function tribunals should, he thought, resolve any doubt in favour of the employee since it is the employer's breach of duty, in failing to provide full and accurate particulars, that makes the employee's application to a tribunal necessary.

His Lordship also made some important comments on the nature of the tribunals' powers when dealing with written particulars. Unfortunately, his analysis appears to mean that there is a loophole in the law. The reason, which is complicated, is as follows. Under the unduly technical provisions as they stand, s 11(1) of the 1978 Act permits an employee to refer an application to a tribunal where the employer does not give the employee a statement as required by law; sub-s (2) permits a reference where a statement as required has been given but the employee alleges that it is inaccurate. Stephenson LJ held that the first subsection includes both the situation where no written particulars at all are given, and the case where some, but not all, of the relevant particulars are given. The second subsection applies only where all the relevant particulars have been given but it is alleged that they are inaccurate. Where the application is under the former subsection, the power of the tribunal is found in sub-s (5) and it is to determine what particulars ought to have been included. In contrast, where the application is under sub-s (2), the tribunal's power is limited by sub-s (6) to confirming, amending or substituting the particulars. So it appears that there is no power under sub-s (5) for the tribunal to substitute other particulars for those actually given, only to state particulars not referred to which should have been included in the statement. This means that if an employer gives an employee a written statement which is wholly inaccurate in every respect, but with one particular omitted, that statement cannot be challenged save in relation to the one particular. This is because since the written statement is not, according to Stephenson LJ, a statement as required by law, the application to the tribunal must be made under s 11(1). But this means that there is no power to substitute or amend the particulars actually given since under sub-s (5) the only power is to include a statement of any particular not given.

It must be admitted that the reverse problem would arise even if it were held that a statement of partial particulars was a statement as required by law. In that case the application would have to be under sub-s (2) and the powers of the tribunal would arise under sub-s (6). This would enable it to correct inaccurate particulars, but it would not permit particulars which should have been given, but were not, to be determined and stated!

The reason for this unsatisfactory loophole lies in the legislative drafting. Had the draftsman said that the power to determine and include a fresh particular would arise when any *particular* had not been given as required by law, and that the power to amend or substitute would exist where the particular as required had been issued, the problem would not have arisen. The same written statement could then have been made the subject of a reference under either or both of sub-ss (1) and (2), depending upon the nature of the applicant's claim. Instead, the draftsman chose to focus upon whether the statement rather than a particular had been issued, with the unfortunate consequences outlined above.

See also the article on Contract, p 73 above.

Trade union membership

A different contractual relationship had to be considered by the Court of Appeal in *Cheall v Association of Professional, Executive, Clerical and Computer Staffs* [1982] 3 All ER 855, the trade union contract of membership. The case highlights the conflict between collective and individual interests which is such a common feature of union membership disputes. The appellant was recruited by the defendant union knowingly in breach of the Bridlington agreement which establishes principles for regulating competition for members between unions affiliated to the Trades Union Congress. If union A recruits from union B in breach of the principles, the latter may complain and the dispute will be heard by a disputes committee set up by the TUC. In *Cheall's* case the award of the committee was that Cheall should be expelled and encouraged to return to his original union. However, a union has no implied power to expel a member to comply with a disputes committee award: *Spring v Amalgamated Stevedores and Dockers Society* [1956] 2 All ER 221. Such a power must be expressly found in the rule-book. In practice virtually all TUC affiliated unions have now adopted a model rule to enable them to implement a disputes committee award. The APEX rule provided that:

> 'Notwithstanding anything in these rules the Executive Committee may, by giving six weeks' notice in writing, terminate the membership of any member, if necessary, in order to comply with a decision of a Disputes Committee of the Trades Union Congress.'

A majority of the Court of Appeal (Lord Denning MR and Slade LJ, Donaldson LJ dissenting) held that the expulsion was unlawful. Both majority judgments emphasised the fact that since the union had knowingly and deliberately recruited in breach of Bridlington, it could not take advantage of its own wrong and rely upon the model rule. They relied upon the contractual principle enunciated by the House of Lords in *New Zealand Shipping Co v Société des Ateliers et Chantiers de France* [1918–19] All ER Rep 552 to the effect that if a party to a contract can avoid the contract on the happening of a

particular contingency, then unless there is an express agreement to the contrary, the courts will not permit that party to bring about the contingency by his own act or omission. Donaldson LJ dissented. He considered that the principle in the *New Zealand Shipping Co* case would apply only if the union artificially stimulated a disputes committee award but not where it had fought the matter out before the committee. He also rejected two other arguments that had been relied upon by Lord Denning: that there was a common law right for a person to belong to a union of his choice which right was infringed because Cheall was unreasonably expelled; and that the failure to give the appellant a hearing before his expulsion constituted a breach of natural justice. Donaldson LJ accepted that there might be circumstances where natural justice required a hearing, such as where the member's own conduct was in issue, or where the member wished to challenge the validity of a disputes committee's award, but he denied that a hearing was required as a matter of course. In the event, this dissenting judgment has been vindicated by the House of Lords which has upheld the union's appeal broadly for the reasons given by Donaldson LJ (see [1983] 1 All ER 1130).

Anti-discrimination provisions

The Equal Pay, Sex Discrimination and Race Relations Acts together combine to render certain forms of discriminations unlawful. The cases reported in this area reinforce two features of the legislation that have been apparent for some time. The first is the importance of European law particularly in the field of sex discrimination; the second is the way in which the Commission for Racial Equality and the Equal Opportunities Commission, bodies which were set up by statute to help eliminate discrimination, are in fact severely hampered from operating effectively by the very legislation that created them.

Three of the reported decisions concern European law and its relationship to the British sex discrimination provisions. In *Worringham v Lloyd's Bank Ltd* [1982] 3 All ER 373, the Court of Appeal merely had to give effect to a decision of the European Court made following an earlier reference to that body. The European Court had held that a contribution to a retirement benefit scheme paid by an employer in the name of an employee by means of any addition to his gross salary constituted 'pay' within the meaning of Article 119 of the Treaty of Rome (see [1981] 2 All ER 434). The other two cases both involved the effect of s 6(4) of the Sex Discrimination Act 1975 which provides an exception to the principle of non-discrimination by permitting sex discrimination as regards a 'provision in relation to... retirement'. In *Garland v British Rail Engineering Ltd* [1982] 2 All ER 402 the facts were that the respondents provided their retired male employees with concessionary travel facilities for themselves, their wives and dependent children, but they denied the same privilege to retired female employees. The Court of Appeal, construing s 6(4) very literally, had held that the benefit in question fell within that provision on the grounds that that exception covered any provision about retirement. However, on a reference to the European Court by the House of Lords, the Court of Justice held that since the benefits in question were an extension of facilities granted during employment, they constituted 'pay' within the meaning of Article 119 of the Treaty of Rome,

notwithstanding that they were not contractual entitlements. In the light of this ruling, the House of Lords held the phrase 'a provision . . . in relation to retirement' should be construed so as to exclude a privilege existing during employment which was continued after retirement. As Lord Diplock observed, this construction could be given without any undue straining of the statutory language; European and English law were not in conflict. Consequently it was not necessary for their Lordships to determine the fundamental constitutional question of whether, in the light of s 2(4) of the European Communities Act 1972, which purports to give precedence to European law even over future Acts of Parliament, anything short of an express positive statement in an Act would justify an English court in construing a statutory provision in a manner inconsistent with Community law.

The decision of the European Court of Justice in *Burton v British Railways Board* [1982] 3 All ER 537 raised the thorny question of retirement ages. In this case the discrimination practised by British Rail allegedly operated in favour of women. Under the railway's voluntary redundancy scheme, both men and women could choose to be made redundant within five years of their retirement age. The effect, broadly, was to enable them to receive their pension up to five years before pensionable age. But since women retired at 60 and men at 65, this meant that Mr Burton, who was 58 and wished to take advantage of the scheme could not do so, though a woman of the same age would have been eligible to benefit from it. Before the Employment Appeal Tribunal Mr Burton accepted that since the benefit was non-contractual, his appeal had to be under the Sex Discrimination and not the Equal Pay Act, and that under s 6(4) of the Act it was lawful for British Rail to treat him less favourably as regards access to this particular voluntary redundancy scheme. However, he contended that the discrimination was unlawful under European law, relying upon Article 119 of the Treaty of Rome and various provisions of both the EEC Council Directive 75/117 on equal pay and Directive 76/207 on equal treatment, and the issue was referred to the European Court by the EAT. The court held that since the question concerned conditions of access to a benefit rather than the benefit itself, only the equal treatment directive was relevant. Had the court held that the discrimination was in breach of the Directive, this would have compelled it to decide a vitally important question which it has long managed to avoid answering, namely whether in certain circumstances Directives can be enforced by individuals in the courts of member states not merely against the States themselves (a right already established by the European Court in *Van Duyn v The Home Office (No 2)* [1975] 3 All ER 190) but also against other individuals or private groups. In the event it proved unnecessary to decide this highly controversial question because the court held that the discrimination practised by British Rail did not conflict with the Directive. This was because British Rail's scheme was related to the state retirement scheme, and Article 7 of EEC Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security expressly provides that the Directive shall be without prejudice to the right of member states to discriminate on grounds of sex for the purposes of granting old age and retirement and related benefits. Consequently the court held that since British Rail's discrimination stemmed from the different minimum pen-

sionable age under national legislation, it could not be regarded as discrimination within the meaning of Directive 76/207.

Two important Court of Appeal decisions concerned the 1976 Race Relations Act. *Mandla v Dowell Lee* [1982] 3 All ER 1108, whilst not specifically about employment, has important implications in that field. The Court of Appeal held that discrimination against Sikhs was not discrimination on grounds of ethnic origins within s 3(1) of the 1976 Act. However, this controversial decision has since been reversed by the House of Lords ([1983] 1 All ER 1062). The other decision concerned the scope of the right of appeal against a non-discrimination notice issued by the Commission for Racial Equality. The procedure for issuing such notices is extremely convoluted: the party investigated has a right to submit representations to the Commission both before the initial detailed investigation is undertaken and again before any final non-discrimination notice is issued. There is then a right of appeal against the non-discrimination notice under section 59 of the Act. The case of *Commission for Racial Equality v Amari Plastics Ltd* [1982] 2 All ER 499 concerned the nature of that appeal. The issue in dispute was clearly defined and involved the construction of s 59(2). It was this: did the Commission have to give particulars of every fact found in the course of its investigations, or was the right of appeal limited to challenging only those findings of fact which were relevant to the reasonableness of the requirements imposed by the non-discrimination notice? The Court of Appeal unanimously held the former, notwithstanding that this could effectively mean reopening the whole of the lengthy administrative inquiry conducted by the Commission. As Lord Denning observed, 'the machinery is so elaborate and so cumbersome that it is in danger of grinding to a halt.' His Lordship graphically depicted the impotence of the Commission in this sphere, commenting that 'they have been caught up in a spider's web spun by Parliament, from which there is little hope of their escaping'. Griffiths LJ saw a possible escape in amending the 1976 Act itself, and as he noted, the Commission is empowered under s 43(1)(c) of the Act to make proposals to the Secretary of State suggesting appropriate amendments.

Trade union rights

Section 27 of the Employment Protection (Consolidation) Act 1978 gives officials of registered independent trade unions a right to reasonable time off with pay for the purpose of enabling them to carry out certain trade union duties; s 28 gives a similar right to reasonable time off to members of such unions for the purpose of enabling them to carry out certain trade union activities, but in this case the right is to unpaid time off only. In *Beal v Beecham Group Ltd* [1982] 3 All ER 280 the Court of Appeal was faced with the task of determining where the boundary runs between trade union duties and trade union activities. The appellant employers had agreed to give time off to various officials to attend a meeting 'to discuss matters of an industrial relations nature and to plan a coordinated industrial relations strategy,' but only without pay, ie they considered that s 28 rather than s 27 applied to the time off. They put forward two grounds supporting this interpretation: first, that the meaning of 'trade union duties . . . concerned with industrial relations' in s 27(1) required that the duties had to involve the actual transaction

of industrial relations business or have a sufficiently close and proximate relationship to actual negotiations for them to be considered part of the collective bargaining process; and secondly, that the duties carried out must be consistent with the recognition afforded by the union. This latter contention involves seeing the act of recognition as not merely defining the union whose officials could take advantage of section 27, but also as defining the range of duties falling within section 27—a proposition specifically rejected by the EAT in *Sood v GEC Elliott Process Automation Ltd* [1980] ICR 1.

The Court of Appeal rejected both arguments. O'Connor LJ, with whose judgment both Sir Stanley Rees and Stephenson LJ agreed, relied upon the ACAS Code of Practice on 'Time off for Trade Union duties and activities' to support his conclusion that trade union duties may well include both preparatory work and explanatory work by officials; and he followed *Sood* in holding that the scope of union duties was not defined by the extent of the recognition agreement. However, he accepted that the agreement 'may well be of very great importance' when considering what is reasonable time off under s 27(2).

O'Connor LJ also dealt with another frequently recurring problem which arises in the interrelationship of ss 27 and 28, namely how to categorise meetings which include some matters concerned with union duties and some with union activities. For despite the title of the meeting in this case, its purpose was also in fact to exchange information, a function which O'Connor LJ unequivocally considered would constitute a trade union activity under s 28 but not a union duty under s 27. Even so, he held that the court should not seek to determine the 'prime' or 'predominant' or 'real' purpose of the meeting in order to decide whether it falls within s 27 or not. If some of the agenda is concerned with trade union duties then the section applies: the question of whether these duties are central to, or merely an incidental part of, the meeting will be relevant in deciding what is reasonable under s 27(2), but not in determining whether s 27 is in principle applicable.

Industrial conflict

Hadmor Productions Ltd v Hamilton [1982] 1 All ER 1042 was the first House of Lords decision concerned with considering s 17 of the Employment Act 1980. That section has restricted the operation of the immunities provided by s 13 of the Trade Union and Labour Relations Act 1974. The facts of the case were that the plaintiff company made television programmes for sale to network television stations to transmit. Members of the defendant union were employed to make the programmes. After two programmes had been transmitted by Thames Television, members of the defendant union at the television station's branch resolved to 'black' the plaintiff's programmes. They were concerned that the jobs of permanent members employed at the station would be threatened if the station acquired programmes from facility companies. Furthermore there was an agreement between Thames Television and the defendant union that no films produced by facility companies would be transmitted without prior consultation with the union. In the light of the 'blacking' resolution, Thames decided not to transmit any more programmes. Since they were not contractually obliged to show them, the union had induced no breach of contract between the plaintiffs and Thames.

Nevertheless the plaintiffs sought an injunction on the grounds that the defendant union officials had interfered with their business using unlawful means viz threatening to induce breaches of contract by union members. They were successful in the Court of Appeal but failed before their Lordships.

Lord Diplock, who gave the only reasoned judgment in the House (Lord Fraser, Lord Scarman, Lord Bridge and Lord Brandon concurring) considered, either directly or indirectly, four important issues: whether the tort of interference with trade or business by unlawful means exists; whether on the facts the defendants were acting in contemplation or furtherance of a trade dispute; if so, whether they could rely upon the immunities as against the particular plaintiff; and the principles on which interlocutory injunctions should be granted in trade dispute cases.

As to the first issue, it was clear that if the threat to black involved a threat to commit unlawful acts, it was actionable at common law as intimidation, established in *Rookes v Barnard* [1964] 1 All ER 367 and it was not necessary to determine whether this was merely an aspect of a wider tort of interfering with business by unlawful means. However, Lord Diplock pointed out that it was distinctly possible that the threatened blacking was not unlawful at all. It may be that it did not constitute breaches of contract by the union members concerned on the grounds that the term in the collective agreement requiring Thames to consult prior to transmitting programmes produced by facility companies might well have become incorporated into the contracts of employment of the members concerned, in which case they would have been acting lawfully in refusing to transmit the programmes. But his Lordship thought that it would be inappropriate to determine this matter at an interlocutory stage.

On the central question of whether the defendants' actions were in contemplation or furtherance of a trade dispute, the Court of Appeal and House of Lords parted company, Lord Diplock thought that the conflict was 'a classic instance of a trade dispute arising out of fears for job security in a period of high unemployment'. On the facts of this case, where Thames were well aware of the concern of the union about the use of facility companies, this was a reasonable observation. But query whether there could be said to have been a dispute in existence if the union had decided to 'black' facility company programmes in this way without first raising objections with the employer about the transmission of such programmes and giving him an opportunity to respond: dicta in *Stratford v Lindley* [1964] 3 All ER 102 suggest that there would then be no dispute.

Once a trade dispute was established Lord Diplock had no doubt whatsoever that the immunities in s 13 could be relied upon by the defendants as against Hadmor. In the Court of Appeal Lord Denning had held that the effect of s 17 of the 1980 Act was that a defendant could plead the benefit of the immunities only as against the employer whose employees were involved in taking the industrial action and not third parties. Lord Diplock convincingly showed that this was a total misconception of the effect of s 17. Furthermore, insofar as Lord Denning had supported his construction by relying upon *Hansard*, he was roundly condemned for so doing, particularly since he had thereby acted in flagrant breach of a recent ruling of the House in *Davis v Johnson* [1978] 1 All ER 1132.

As regards the last issue Lord Diplock held the judge at first instance, when exercising his discretion whether or not to grant an interlocutory injunction, was right to take into account the fact that even if the blacking ceased, there was little likelihood that Thames would transmit the programmes. They could not be compelled to transmit them since they had no contractual obligation to do so. However, it is submitted that this factor should not be a powerful one. Where the plaintiff is seeking an injunction for interference with business by unlawful means, he is trying to ensure that the party from whom he has expectations of future business will be able to consider whether or not to fulfil those expectations free from any unlawful acts by the defendant. At the very least the evidence that the third party will not in any event fulfil those expectations should be extremely strong before the court is willing to conclude that granting an injunction would serve no useful purpose. The injunction is not issued in vain even if it merely increases the likelihood of those expectations being realised.

In *Marina Shipping Company v Laughton* [1982] 1 All ER 481 the Court of Appeal had to consider the application of s 17 in rather unusual circumstances. A dispute arose between shipowners, who ran a cargo vessel under a flag of convenience, and the International Transport Workers Federation (ITF). At the relevant time the ship was chartered to a third party on a time charter. Crew members who were employed by the owners, had complained about their terms and conditions of service. As a result the ITF 'blacked' the ship when it was docked in Hull, and it advised other unions of the blacking. Accordingly members of the National Union of Railwaymen (NUR) refused to operate the lock gates and this prevented the vessel from leaving the port. The action of the workers concerned constituted a breach of their employment contracts with the port authority. The plaintiff shipowners sought, inter alia, an interlocutory injunction to restrain the defendants, two ITF officials, from interfering with their business using unlawful means, and from interfering with their contract with the charterers. They alleged that the action of ITF constituted unlawful secondary blacking under s 17 of the 1980 Act. The defendants argued that their action fell within the terms of s 17(3) which provides one of the exceptions to the principle that secondary action is unlawful. This subsection provides that secondary action is protected if the purpose or principal purpose is directly to prevent or disrupt the supply of goods or services between the employer who is a party to the dispute and the employee whose employment contracts are affected, and if the action is likely to achieve that purpose. But s 17(6) then adds that the reference in sub-s (3) to the supply of goods or services means the provision of such goods or services under a subsisting contract. In view of this, the Court of Appeal held that the action would fall within the secondary action permitted by sub-s (3) only if the shipowners had contracted with the port authority. So the issue resolved itself into whether a ship's master was agent of the owners when contracting for the port authority's services. The Court of Appeal (Lawton, Brightman and Oliver LJJ) unanimously held that he was not. The contract for port services was between the port authority and the charterers, not the owners. Consequently the conditions in s 17(6) were not satisfied, and the secondary action was unlawful. Brightman LJ however, granted the injunction solely on the grounds of interfering with contractual rights; he left open the question of whether a cause of action based only on interference with

business by unlawful means would have been sufficient to justify the injunction being granted.

This case is important because it demonstrates how the often fortuitous presence of third parties—here the charterers, but in other cases it could be carriers breaking the contractual link between the employer who is a party to the dispute and the employer whose employees are involved in the secondary action—may result in otherwise lawful secondary action being rendered unlawful. It also shows that once secondary action is unlawful, it opens up liability not merely at the hands of those secondary employers whose commercial contracts are affected by the action, but also at the hands of the primary employer himself with whom the union is in dispute. This consequence of s 17 has since been more fully appreciated in *Merkur Island Shipping Corp v Laughton* [1983] 1 All ER 334, another Court of Appeal decision involving the same defendants which applied the decision in *Marina Shipping Company* to a similar kind of dispute. There the argument that s 17 restricted the legality of secondary action only for the benefit of third party employers and not the primary parties to the dispute was specifically put forward and rejected.

Trade disputes and economic duress

Although immunities have long been provided to counter certain common law torts, the ability of the common law to fashion new forms of liability, or to apply old forms in unexpected ways, has been a major feature in the history of the law of industrial conflict.

Universe Tankships Inc of Monrovia v International Transport Workers' Federation [1982] 2 All ER 67 continues the tradition. It was yet another case involving the International Transport Workers Federation. In their campaign against shipowners operating under flags of convenience, the ITF took industrial action to compel the plaintiffs to improve the terms and conditions of employment of seamen employed on their ship the *Universal Sentinel*. The union 'blacked' the ship and effectively prevented it leaving the port of Milford Haven. As part of the settlement leading to the calling off of the sanctions and the release of the ship, the plaintiffs agreed to pay a sum in excess of US $6000 as a contribution to the union's welfare fund. The issue before the House of Lords was whether the plaintiffs could claim the right to restitution of that sum. They based their right to repayment on two grounds. First they alleged that the money was held on a resulting trust in their favour, but the argument failed. They were, however, successful in their alternative contention that they were entitled to restitution because the money had been obtained from them by economic duress.

As Lord Diplock observed the essence of economic duress is that the plaintiff is induced to give way to a demand by pressure which the law does not regard as legitimate. But all their Lordships accepted that where the pressure takes the form of tortious acts to which immunity has been given, the plaintiff cannot simply waive the tort and instead claim restitution under the principle of economic duress. It must be assumed that by legitimising certain forms of industrial action, Parliament intended that such actions should also be considered lawful pressure and not give rise to a restitutionary claim. So the question which their Lordships considered to be crucial was

whether industrial action taken to secure payments to the welfare fund would constitute action taken in contemplation or furtherance of a trade dispute: if so, the money could not be recovered; if not, the demand was unlawful and restitution was available to the plaintiffs.

By a bare majority (Lord Diplock, Lord Cross and Lord Russell; Lord Scarman and Lord Brandon dissenting) their Lordships held that a dispute relating solely to the welfare payments would not constitute a trade dispute. It was not, in the view of the majority, a dispute connected with terms and conditions of employment within the meaning of s 29(1) of the Trade Union and Labour Relations Act 1974, even granted that the House of Lords in *Hadmor* [1982] 1 All ER 1042 had accepted that the latter phrase should be widely construed. Nor, according to Lord Cross, could it have been converted into a dispute connected with terms and conditions by the simple expedient of seeking to make the obligation to make the welfare payment a term of each worker's contract of employment. This opinion would, however, appear to conflict with Lord Denning's view, expressed in *BBC v Hearn* [1977] 1 All ER 111, that virtually any dispute can be converted into a trade dispute if it is couched in the form of a request that the demand made should be treated as a term or condition of the workers' contracts. Lord Cross' approach presupposes that when Parliament gave immunity to certain torts committed in the course of a trade dispute connected with terms and conditions of employment, it had in mind only certain categories of terms and conditions which relate to a worker's job; it did not intend to include terms which do not impinge directly on his employment but happen to have been incorporated into his contract. It is submitted that this is a reasonable assumption, notwithstanding the very real difficulty of deciding whether a particular term falls into the protected category or not. For it is difficult to believe that, to cite two examples given by Lord Diplock, Parliament intended to give immunity to industrial action designed to compel an employer to make a contribution to a particular political party or to a guerrilla group in some foreign country, provided the union simply remembered to demand that the payment should be required under the terms of each worker's contract of employment.

The majority also held that the mere fact that the demand for the welfare contribution was made at the same time as a demand for improvement in terms and conditions of employment did not mean that it thereby became a dispute 'connected with' terms and conditions so as to be protected. (A fortiori it could not be treated as 'wholly or mainly related to' terms and conditions within the amended definition of a trade dispute provided by the Employment Act 1982).

The minority dissented on the grounds that the particular contribution was sufficiently connected with terms and conditions of employment. But both dissenting judges emphasised that they did see the contribution as providing a potential benefit to the workers concerned. Had they concluded that there was no possible personal benefit to the workers—such as in the example of a contribution to the political party or a guerrilla group—then it is clear that they would have held that there was no trade dispute, that the pressure exerted by the union constituted unlawful economic duress, and that restitution was available to the plaintiffs.

An interesting feature of the *Universe Tankships* case is that restitution was available even though the employer would not have been able to obtain an

injunction to have the industrial action itself called off. Even following the Employment Act 1982 if a dispute is mainly about, say, terms of employment it will attract the immunities notwithstanding that a subsidiary demand leads to an employer making a payment which he can later reclaim restitution on the grounds that it was paid under economic duress.

Industrial action and dismissal

Employers rarely seek injunctions to restrain industrial action. More frequently they are likely to resort to the remedy of self-help, ie dismissing the strikers. However, unless certain conditions are satisfied, the workers so dismissed will be able to make claims for unfair dismissal. The relevant conditions are found in s 62 of the Employment Protection (Consolidation) Act 1978 (now as amended by the Employment Act 1982). Broadly the main requirement is that the employer should not discriminate as between those workers taking part in the industrial action, either by dismissing only some but not others, or by dismissing them all but subsequently re-engaging some. Provided the employer does not discriminate in one of these ways, then an industrial tribunal has no jurisdiction to hear any claims for unfair dismissal from any of the dismissed workers. Prior to the 1982 amendment, the principle of non-discrimination applied to those taking part in the industrial action at any time. Following the 1982 Act it applies only to those still taking industrial action at the date of dismissal. So as the law now stands, if some workers have returned to work by the time of the dismissal, the employer will not have to dismiss them in order to deprive a tribunal of its jurisdiction to hear claims of unfair dismissal from those whom he has dismissed.

A crucial issue, both under the pre and post 1982 laws, is to determine which workers have been taking part in the industrial action. In particular, is a worker taking part in the action where he reluctantly participates but is not committed to, or does not support, the collective aims of the group? The Court of Appeal has to decide this question in *Coates v Modern Methods and Materials Ltd* [1982] 3 All ER 946. Following the dismissal of a number of workers who were taking strike action, two of the dismissed workers made an application for unfair dismissal. They alleged that another worker, Mrs L, had also participated and not been dismissed, and that consequently the tribunal had jurisdiction to hear their claims. The employer denied this alleging that although Mrs L had stopped work with the other workers, it was only because she was afraid of the abuse she would receive from her fellow workers if she returned to work. They argued that this motive for participating meant that she was not taking part in the action within the meaning of s 62 at all, and that the tribunal had no jurisdiction to hear the applications. But they were unsuccessful: a majority of the Court of Appeal (Stephenson and Kerr LJJ; Eveleigh LJ dissenting) held that Mrs L was taking part. But even among the majority there was a division of opinion about the relevance of the motives of those participating. Kerr LJ's position was unequivocal: he thought that once a worker stayed out, his reason or motive for so doing was wholly irrelevant. Stephenson LJ adopted a less rigorous position, taking the view that a person stopping work with the other employees would not be taking part in a strike unless he were to do or say something to make plain his disagreement, though how or to whom this

disagreement should be made manifest is far from clear. Finally Eveleigh LJ, in his dissenting judgment, held that in order to be taking part in a strike, he must be acting in concert with the others who have withdrawn their labour.

These three different expressions of opinion about what constitutes taking part in the industrial action leave the law in a state of some confusion. This is compounded by the fact that the Court of Appeal held that the construction of these words was not in any event a question of law but, in the words of Stephenson LJ, 'just the sort of question which an industrial tribunal is best fitted to decide'. Only if the construction given by the tribunal reveals 'the plainest error in law' should an appellate court interfere. With respect, this is a recipe for total confusion and palm tree justice, with each individual tribunal acting on its own subjective view of what industrial action involves. In a matter of such central importance as determining the rights of workers and employers in the context of industrial action, it is extraordinary that the Court of Appeal is content to accept that a tribunal may adopt any of the differing views expressed by their Lordships in *Coates'* case—which presumably are all constructions which a reasonable tribunal might adopt—and still be correct in law.

Health and safety

The Health and Safety at Work Act 1974 arguably affects the daily practice of labour relations more than any other single piece of legislation, yet surprisingly the Court of Appeal decision in *Re v Swan Hunter Shipbuilders* [1982] 1 All ER 264 was the first occasion on which any of its provisions have had to be considered by a court of law.

The case concerned the construction of ss 2 and 3 of the Act. Section 2 imposes a general duty on an employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of his employees. More specifically it requires the employer to provide a safe system of work and relevant information and instruction. Section 3 requires an employer so far as is reasonably practicable to conduct his undertaking in such a way that persons not in his employment are not exposed to risks to their health or safety. Subsection (3) of that section then provides that in certain prescribed circumstances to be laid down in regulations, an employer will have to give prescribed information about potential hazards to persons not employed by him. The issue before the Court of Appeal was whether the provision of a safe system of work for his employees could oblige the employer to instruct workers who were not his employees (in this case sub-contractors); and whether information would have to be provided to non-employees under either s 2 or 3 notwithstanding in relation to the latter section, that no regulations have yet been made under sub-s (3). The Court of Appeal (Dunn LJ, Michael Davies and Anthony Lincoln LJJ) held that the employer could be obliged to instruct non-employees and provide them with relevant information under both ss 2 and 3. If such an obligation were thought to be unduly onerous in any particular case, it would be open to the employer to establish that it was not reasonably practicable to comply with this aspect of his duty. Moreover the court expressly rejected the argument in relation to s 3, that the existence of sub-s (3) dealing expressly with the giving of information demonstrated that there can be no duty to provide information under

sub-s (1). The court accepted the view of the judge at first instance that sub-s (3) was concerned with a very limited class of cases where only certain prescribed information was to be provided; it in no way restricted the scope of sub-s (1) itself.

Evidence

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Introduction

The review of a year's crop of decided cases in a given field is not likely to result in a coherent and well integrated description of the law in that field, but it could highlight the main problems faced in the subject, as well as serve updating purposes. At the basis of the law of evidence there lies a tension between freedom of recourse to any evidence or material that could in common sense advance the inquiry on the issue of fact, on the one hand, and, on the other hand, competing principles or policies which demand restraint of freedom of proof. As far as evidence in civil cases is concerned this conflict has been largely resolved, for few of the rules excluding relevant evidence obtain in civil proceedings and fewer still are applied in practice. Not so in criminal cases, where two very strong principles operate against freedom of proof; namely, the need to protect the citizen from wrong conviction and the privilege against self-incrimination. The first fosters rules concerning the standard of proof, corroboration, similar fact evidence, hearsay and the like. The second underpins the right of silence, the rules concerning confessions and their various relatives. Most of the cases on evidence are therefore criminal cases and the following discussion will be mainly concerned with criminal evidence.

In civil proceedings there remains, basically, one major problem—that of the strength and scope of the right of access to evidence: that is, the extent to which a litigant may insist on the court's help to secure relevant evidence which is in the hands of another individual or a public body. This right of access to evidence will be partly dealt with in this section, as public interest immunity, and partly in the article on Practice and Procedure (pp 209 et seq below), in relation to *Anton Piller* orders.

Let us begin by considering cases dealing with rules which are intended to protect the accused from mistaken conviction.

Evidence of accomplices

There is a rule of practice which requires trial judges to warn juries against the danger of convicting on the basis of the uncorroborated evidence given by an accomplice of the accused. The reason for the rule rests on suspicion of the accomplice's reliability. There is a danger of the accomplice testifying under a strong motive to make false accusations against the accused. However, the law of evidence does not provide a definition of 'accomplice'. For this it refers to the substantive criminal law; but the substantive law's definition is only concerned with allocating criminal liability and has little to do with whether persons falling into the definition may have a motive for implicating an innocent person in their misdeeds. Take, for example, the situation where only A or B (but not both) could have committed the crime, and the

prosecution calls A to give evidence that it was B who perpetrated it. A cannot be an accomplice but he could still have the strongest possible reason for blaming B, as he would thereby exculpate himself. For this reason Edmund Davies J said in *R v Prater* [1960] 1 All ER 298, 299–300 that 'in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given'; that is, whether or not such person may be considered an accomplice. This dictum was considered in *R v Beck* [1982] 1 All ER 807 where, it is sufficient for the present purposes to note, the accused's contention was that the prosecution's witnesses were lying in order to clear themselves of other offences of fraud committed by them. In his summing up the trial judge did not administer the formal accomplice warning, but instead told the jury that they should exercise particular care in relation to the testimony of these witnesses in view of the accused's attack on them. The Court of Appeal refused to accept that the dictum in *Prater* represented a general rule (thus following the previous trend in *R v Stannard* [1964] 1 All ER 34 and *R v Whitaker* (1976) 63 Cr App R 193). While Ackner LJ stressed that the judge had a duty to 'advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive', he refused to accept that there was any obligation on the judge to give a full blown accomplice warning where the witness could not be said to be an accomplice to the offence charged. Superficially, this would seem an undesirable restriction on the practice of warning, for, as we have seen, the witness's motive for implicating an innocent person in an offence to which the witness bears some relation may be just as strong as in the most obvious accomplice case; and, vice versa, there must be many accomplice situations in which a warning has to be given as a matter of duty but where there is little, if any, danger of the accomplice implicating an innocent man. However, the accomplice rule of practice has become laden with technicalities which are not always necessary for the protection of the accused and which at times lead to unwarranted acquittals (see Professor Glanville Williams in [1962] Crim LR 588). Wigmore too considered the warning rule an obstacle to justice (7 Wigmore (Chadbourne Rev) §2060) and commented that the rule

> 'tends to become in practice merely a means of securing from the trial judge the utterance of a form of words which may chance to be erroneous and lay the foundation for a new trial' (ibid, §2061).

Indeed, there is no warning requirement in the American Federal Rules of evidence, and the Supreme Court of Canada has recently abandoned the practice, contenting itself with a general requirement that the trial judge should direct the jury to properly consider any relevant weakness in the witness's testimony (*Vetrovec v R* (1982) 136 DLR (3d) 89).
The Court of Appeal's decision in *Beck* may, therefore, be considered as a step in the same direction, as containing the scope of what has become an unnecessary technicality.

There are two further points to be noted about *Beck*. The first concerns the rule that only confirmatory evidence which is independent of the witness requiring corroboration may be considered as corroborating the accused's testimony (*R v Baskerville* [1916] 2 KB 658, 667). This rule too has been criticised by Wigmore as resting on a fallacy (7 Wigmore (Chadbourne Rev)

§2059), for while it is true that the mere repetition by the witness of his account does not necessarily strengthen the credibility of the account, it does not follow that the witness's veracity can never be rendered wholly reliable by the circumstances in which he reacted out of court. The present case provides just such an example. One of the witnesses for the prosecution, M, had been the accused's partner and had pleaded guilty to involvement in the fraudulent practices in respect of which the accused was charged. These practices had first been exposed in a television programme, and it was shown that on hearing about this, M reacted with shock and contrition and offered to put things right. The Court of Appeal approved of the judge's direction that M's reaction may be taken as corroboration of his subsequent testimony at the trial, and rejected the accused's contention that the rule, whereby a recent complaint by the victim of a sexual assault cannot in law constitute corroboration, should also apply to accomplices. As Ackner LJ put it—

> 'The reason for the direction in sexual cases is that if the "victim" is intending to make a false accusation she (or he) may well, in order to add weight to the complaint, put on an act and simulate distress. No such suggestion was made here in respect of this evidence' (p 816).

The distinction is not altogether convincing, for the same could be said of an accomplice who intends to make a false accusation, but the conclusion is correct in common sense, since here M was taken unawares by the programme and his reaction could not have been a studied one. It is to be hoped that the present approach will also lead to the reversal of the rule concerning recent complaints, so as to allow such confirmatory weight to be given to a complaint as is justified by the circumstances.

Relevance to the issue and relevance to credibility

In the meantime, if recent complaint cannot constitute corroboration, what is then the purpose of placing it before the jury? It is said that it goes to support the credibility of the complainant, and not that it is proof that the events complained of happened. A distinction is drawn in this respect, as well as in a number of others, between relevance to the issue and relevance to credibility. It is, however, argued that there is nothing in this distinction to justify rules which treat differently admissibility of evidence that goes to credit from admissibility of evidence that goes to the issue. Take the rule concerning finality of a witness's answers to questions put to him in cross-examination. It is said that the cross-examining party may adduce evidence in rebuttal of the witness's answer only if it goes to the issue but not if it merely goes to credit. The underlying assumption is that evidence that goes to credit is generally less important, that it is of lower probative value. A moment's reflection will dispel this assumption. Suppose the only issue is the identity of the offender, and the only evidence for the prosecution is the testimony of a witness who claims to have seen the accused commit the offence from a distance of 40 yards. Suppose the accused can show that the witness is incapable of seeing anything clearly further than 20 yards from his nose. This evidence is of crucial importance, and even if it is accepted that it goes to credit only, it would be absurd to exclude it since it could completely remove all the probative force that the testimony might otherwise have. If our main object

is reaching a factually correct conclusion, admissibility should depend on the probative worth or potential of the evidence, and not on distinctions that do not necessarily reflect probative differences. To mitigate the extremity of the finality rule, it is said to be subject to a number of exceptions. But unless we regard the list of exceptions as open-ended, the rule would produce injustice whenever it resulted in the exclusion of evidence which was of considerable probative significance in the case. It could, however, be argued that this is not the law and that in practice the courts admit all evidence which is sufficiently relevant, regardless of the issue-credibility distinction.

The validity of the distinction could, furthermore, be questioned even logically and quite independently of its legal results. It is accepted that a fact is relevant to another when it renders the existence of the other more probable. Our witness's statement is relevant because it renders it more probable that the accused was the offender. But the statement could have this effect only if it is believed, or at least if it carries some, albeit small, credibility. If the statement carried no credibility at all—as would the blabber of a madman—it would be irrelevant. The connecting link, therefore, between the statement and the conclusion from it, is credibility. In other words, the relevance of a witness's testimony is embedded in its credibility. True, at the admissibility state, the judge is only concerned with relevance and is not concerned to assess how credible the witness is. But he can rule the statement relevant only if it has some potential for credibility. Returning to our example, when it is shown that our witness cannot see beyond 20 yards, then this factor becomes subsumed in the only evidence we have. We now have as the only evidence for identification the statement of a witness who cannot see beyond 20 yards. This evidence goes to the witness's credibility, but in as much as this credibility is of relevance to the issue, it also goes to the issue. Suppose that the witness testified: 'I saw the accused, but I am not sure.' The qualifying words are as much a part of the evidence which goes to the issue as the opening words. It is true that the information concerning our witness's eyesight is significant only because the witness has given evidence and his credibility has become probatively significant. But it does not follow that because the importance of eyesight is contingent upon the fact that the witness has given evidence, that the relevance of eyesight is of a different and inferior kind. All relevance is contingent. No fact is pertinent quite independently of all other facts. When we assume relevance we always assume some generalization and usually also combinations of facts. We may therefore conclude that the distinction between relevance to the issue and relevance to credibility can neither serve any practical purpose nor can it be defended in the abstract.

With this in mind we may now approach *R v Viola* [1982] 3 All ER 73. The accused pleaded consent to a charge of rape and wished to put, inter alia, the following questions to the complainant in cross-examination: (1) whether a few hours before the alleged offence she had made sexual advances at two casual visitors; and (2) whether a few hours after the incident she had a naked man in her house. The trial judge, relying on s 2 of the Sexual Offences (Amendment) Act 1976, disallowed the questions. Section 2(1) forbids cross-examination, or evidence, concerning 'any sexual experience of a complainant with a person other than' the accused without leave of the judge. And s 2(2) provides:

> '. . . the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked . . .'

Lord Lane CJ said that while the judge must, under s 2, disallow questions which merely go to credit, he should allow questions which

> 'are relevant to an issue in the trial in the light of the way the case is being run, . . . as opposed merely to credit, . . . because to exclude a relevant question on an issue in the trial . . . will usually mean that the jury are being prevented from hearing something which, if they hear it, might cause them to change their minds about the evidence given by the complainant' (p 77).

It is submitted that the question of unfairness cannot depend on the distinction between relevance to issue and relevance to credibility. It would always be unfair to disallow a question (or evidence) which could undermine the probative value of the complainant's evidence and thus contribute to the accused's prospects of making out his defence.

The Lord Chief Justice seemed to concede as much when he observed that—

> '. . . a grey area . . . exists between the two types of relevance, namely relevance to credit and relevance to an issue in the case. On one hand evidence of sexual promiscuity may be so strong or contemporaneous in time to the event in issue as to come near to, or indeed to reach the border between mere credit and an issue in the case. Conversely, the relevance of the evidence to an issue in the case may be so slight as to lead the judge to the conclusion that he is far from satisfied that the exclusion of the evidence or the question . . . would be unfair to the defendant.'

If this is the case, would it not be preferable to discard altogether the unfruitful distinction between relevance to issue and to credibility? For in doing so we would spare ourselves the need to search for insignificant borderlines and we would be in a better position to concentrate on the true test: is the question or the evidence sufficiently relevant to warrant admissibility? It should be noted that the same test will apply both to questions in cross-examination concerning previous sexual experience and to independent evidence thereof. At common law the finality rule only applies to evidence in rebuttal and not to questions put in cross-examination. The main significance, therefore, of s 2 is to subject questions put in cross-examination to the same restrictions which apply at common law to evidence directed to undermine the reliability of the complainant, when such evidence is insufficiently probative or where it is more likely to confuse than to illuminate.

In the event the Court of Appeal decided that the questions set out above

> 'went to the question of consent and were matters which could not be regarded as so trivial or of so little relevance as for the judge to be able to say that he was satisfied that no injustice would be done to the appellant by their exclusion . . .' (p 79)

and quashed the conviction, though it would have been of greater help to trial judges if they were told plainly that they should be solely concerned with sufficiency of relevance and not with distinctions between types of relevance. For if a piece of evidence can significantly affect our view of the strength of the prosecution's case it would usually be unfair to exclude it, whatever its 'type' of relevance might be.

Two further cases, not reported in the All England reports, are of interest here. First *R v Busby* (1982) 75 Cr App R 79 demonstrating the cost exacted by the distinction between relevance to issue and to credibility in terms of unnecessary acquittals and, second, *R v Booth* (1982) 74 Cr App R 123 where the Court of Appeal held that s 4 of the Criminal Procedure Act 1865, allowing the party cross-examining a witness to prove that the witness had made a previous inconsistent statement, does not apply to hostile witnesses. The latter are governed, it was held, by s 3 of the same Act which allows the party calling a witness who proves hostile to adduce his previous inconsistent statements only by leave of the judge. Thus in relation to hostile witnesses the judge has discretion whether or not to allow proof of such statement.

However, in talking about discretion courts must now bear in mind Lord Lane CJ's dictum in *Viola*, above. The Lord Chief Justice observed that it was wrong to talk of discretion in relation to s 2 of the Sexual Offences (Amendment) Act 1976 because—

> 'If he [the judge] comes to the conclusion that he is satisfied it would be unfair to exclude the evidence, then, the evidence has to be admitted . . .' ([1982] 3 All ER at 77).

This, presumably, also applies to the discretion under s 3 of the Criminal Procedure Act 1865, for it is inconceivable that a judge would have the freedom to exclude a previous inconsistent statement when to do so would be unfair. Furthermore, it is submitted that in this context too fairness must be governed by the degree to which the contradictory statement can materially affect the final conclusion. And if this is so, it would seem that there is no substantial difference between ss 3 and 4 of the 1865 Act, for even under s 4 the judge should *not* allow proof of a previous inconsistent statement when, in the circumstances, the inconsistency has negligible probative significance.

Hearsay

We pass now to hearsay, a subject renowned for the demands it makes on legal ingenuity. In *R v Spinks* [1982] 1 All ER 587 the accused was charged with impeding the apprehension or prosecution of the co-accused, contrary to s 4(1) of the Criminal Law Act 1967, and the co-accused was charged with the substantive offence of wounding with intent. The evidence was that after taking part in an affray the co-accused went to a pub where he found the accused, told the latter that there had been a fight and gave him a knife, suggesting that it ought to be hidden, which the accused obligingly did. Under s 4(1) it is an element of the offence of assisting an offender that an arrestable offence has in fact been committed by the offender. In the present case the only evidence to this was an admission made by the co-accused, when interrogated by the police, that he had done the stabbing. Counsel for the accused was quick to plead 'no case to answer' and, when the plea was rejected and the two accused convicted, to appeal. On appeal it was held that the out of court statement by the co-accused was not admissible as against the accused and the conviction was accordingly quashed. Anticipating the raised eyebrows, at an acquittal on the ground that there had not been admissible evidence to prove the commission of the offence of wounding by the co-accused, when the latter had just been convicted of that very offence in the

same proceedings, Russell J pointed out that had the accused been tried separately the offender's out of court statement would have been inadmissible and the accused 'can be in no worse position because he was being tried alongside' the alleged offender (p 589). This analogy, however, is not altogether complete for what was in question here was not just an out of court statement made by a person who was not before the court. There was here an admission of guilt by a co-accused, whose conduct was admittedly connected to that of the accused, and whose guilt was being investigated before, and was to be determined by, the self-same jury. It is quite possible that there was no escape from the hearsay rule in *Spinks*, but recently the courts have shown considerable readiness for circumventing the rule.

An important case not reported in the All England reports, but which merits discussion, is *R v Kelsey* (1982) 74 Cr App R 213, in which the prosecution alleged that the accused, charged with burglary offences, had driven his car near the scene of the crime. It called a witness who testified that he noticed a suspicious car, that it was a white Rover, that he made a mental note of its registration number, and that twenty minutes later he dictated the number to a policeman who took it down, reading it out to the witness to make sure that he got it right. There was no dispute that the accused owned a white Rover bearing the same registration number and that he had not lent it to another. When testifying, the witness could not remember the registration number and the issue was whether he should be allowed to refresh his memory from the policeman's note. If the sight of the note were capable of producing in the witness's mind a present recollection of the number he had seen seven months before the trial, there would be no problem of hearsay at all. It would, however, be pusillanimous to suppose that his memory could have been revived. Had the court been minded to find out whether the witness's memory was truly resurrected, the court could have tested the witness by showing him a number of broadly similar registration numbers, including the one he had dictated, and asking him to pick out the correct number; that is, by conducting an identification parade of numbers. It may be supposed that this was not done because the result was clearly predictable—the witness would not have been able to pick out the number. In a case such as the present one, therefore, we are not dealing with a present memory but with what Wigmore called the record of a past recollection, the recollection which the witness had when he dictated the number to the policeman. It must have been precisely for this reason that the Court of Appeal insisted that, since the witness had not made the note himself or verified it after it had been made by the policeman, the policeman who made the note must be called to prove that the note produced at the trial was indeed the one which was made at the dictation of the witness. It follows that the proof consisted not so much in the witness's revived recollection as in the note itself. And if this was the case then the court's distinction of *R v McLean* (1968) 52 Cr App R 80 (where the situation was very similar), on the ground that there the registration number was sought to be proved by the scribe who took it down from the person who observed it, is unconvincing.

While the argument that the document is merely used to refresh memory is a fictitious subterfuge, there is—it is submitted—a more realistic argument to be advanced in support of the court's undoubtedly sensible conclusion. The hearsay rule forbids the use of an out of court statement as evidence of its

contents because it is not possible to test the reliability of the maker of the statement (this difficulty is largely present also when the maker is in court but cannot remember the events). A statement is reliable if it can be assumed that its originator correctly perceived the events, that he precisely remembered them and that he expressed himself accurately and truthfully; in short, if the maker of the statement is reliable as a transmitting agent. There are, however, situations where the statement is so supported by surrounding circumstances as to render its reliability patent quite independently of the general reliability of its maker. The present case provides just such an instance. The witness says he saw a white Rover car bearing a certain registration number. It is subsequently discovered that the car bearing that number is indeed a white Rover. This discovery, the correspondence between the number and the other features of the observed car, is sufficient to convince us that the witness's observation, as reported in the statement, was accurate on this particular occasion, regardless of the witness's general reliability. Our confidence in the specific reliability of this statement would not be shaken even if we were told that generally the witness has poor eyesight, a faulty memory and a bad record for truthfulness. This is so because the witness's general dependability as a transmitting agent is unimportant here, as the statement is borne out by the circumstances. Of course whether the statement could be regarded as credible in itself, regardless of the reliability of its maker, must depend on the circumstances. In the present case the coincidence of the car's characteristics indicates high reliability because we are prepared to assume that there are no other white Rovers bearing similar registration numbers and, in addition, containing traces of tungsten carbide dust (tungsten carbide having been stolen in the burglary with which the accused was charged).

This explanation has not only the advantage of accommodating the hearsay rule, which the argument of refreshing memory merely sweeps under the carpet, but also draws atention to the important question of probative value, that is; whether the probative value is secure regardless of the general credibility of the statement's maker and, therefore, despite the fact that the general reliability of the agent cannot be tested.

Two further cases illustrate the tendency to overlook the hearsay rule when the evidence seems reliable. One is *R v Okorodu* [1982] Crim LR 747, where the Crown Court allowed the prosecution to adduce a photofit picture constructed by a witness to the crime who subsequently failed to identify the accused at an identification parade. (In *R v O'Brien* [1982] Crim LR 746 it was decided, somewhat incomprehensibly, that a photofit picture could only be used for refreshing memory.) The second case to note is *Kajala v Noble* (1982) 75 Cr App R 149 where it was decided that a film recorded for, and broadcast by, the BBC Television news, was evidence of the affray recorded in the film, even though the camera crew who made the film were not called to testify.

Cross-examination by co-accuseds

Section 1(f) of the Criminal Evidence Act 1898 is also designed to protect the accused from prejudice. Subsection (iii) of this section received attention in *R v Varley* [1982] 2 All ER 519 where Kilner Brown J derived the following propositions from previous authority:

'(1) If it is established that a person jointly charged has given evidence against the co-defendant that defendant has a right to cross-examine the other as to previous convictions and the trial judge has no discretion to refuse an application.
(2) Such evidence may be given either in chief or during cross-examination.
(3) It has to be objectively decided whether the evidence either supports the prosecution case in a material respect or undermines the defence of the co-accused. A hostile intent is irrelevant.
(4) . . . care must be taken to see that the evidence clearly undermines the defence. Inconvenience or inconsistency with the other's defence is not of itself sufficient.
(5) Mere denial of participation in a joint venture is not of itself sufficient to rank as evidence against the co-defendant. For the proviso to apply, such denial must lead to the conclusion that if the witness did not participate then it must have been the other who did.
(6) Where the one defendant asserts . . . one view of the joint venture which is directly contradicted by the other such contradiction may be evidence against the co-defendant.'

The appellant was charged jointly with one D of robbery and both pleaded not-guilty. D admitted participation but contended that he was coerced by the appellant to participate. The appellant denied participation altogether and the trial judge allowed D to cross examine the appellant on his previous convictions. Applying propositions 5 and 6, the Court of Appeal approved the judge's ruling, since if the appellant had been believed D would have been denied his defence of duress. This result drew criticism from the commentator in [1982] Crim LR 300 who expresses the view that the present interpretation impedes the defence, because an accused need only deny participation in order to draw cross-examination on his record, and that it would be much better to reverse *Murdoch v Taylor* [1965] 1 All ER 406 and restore the judge's discretion to allow or disallow cross-examination by a co-accused as to previous convictions. The restoration of discretion, it is submitted, will make little, if any, difference. It could certainly not have prevented the cross-examination in the present case, for it would have been unfair to D not to be allowed to show that the person who he claimed had coerced him had a record of robbery and offences of violence. Indeed, in upholding a 12 years' imprisonment sentence the Court of Appeal described the appellant as a 'determined and dangerous man'. The only way of giving a free hand to one accused without harming the other is to order separate trials; but would it always be in the interests of justice to do so? In the present case the court rejected the argument that such a course should have been taken, saying—

> 'The truth of the matter is that this was a case where two experienced criminals metaphorically cut each other's throats in the course of their respective defences. If separate trials had been ordered, one or other or both might have succeeded in preventing a just result' (p 522).

The court's approach is right, for fairness does not require that the accused's discreditable record should invariably be suppressed. Fairness requires that it should be held back only when its disclosure would lead to unwarranted prejudice, ie when it lacks sufficient probative significance. Varley's record had abundant significance here, notwithstanding that in the event his co-accused was also convicted.

Confessions

We may pass now to rulings on matters connected with the privilege against self-incrimination and begin with confessions. In *R v Rennie* [1982] 1 All ER 385 the accused was charged with a number of deception offences. It emerged in the voir dire that during his interrogation by two police officers, the accused was questioned about the involvement of other members of his family, especially his mother, in the commission of the offences. It was not in dispute that thereupon the accused became very concerned about the possibility that the police would also interrogate his mother, and that he took responsibility for the commission of the offences upon himself, asking the police to leave his family out of it. One of the officers accepted in cross-examination that the accused confessed because he feared that his mother would be interrogated, though the other officer disagreed. The trial judge rejected the first officer's view concerning the reason for the accused's confession, and held that the confession resulted from the accused's realisation of the strength of the evidence possessed by the police. The Court of Appeal upheld the judge's conclusion, saying that—

> '. . . the speculations of the officer as to the motives of the accused were not admissible in evidence. The drawing of inferences from the course of events at the interview was a matter for the judge, not the witness' (per Lord Lane LJ, at p 388).

Given the undisputed facts which emerged in the voir dire, the officer's view as to the accused's motive appears more than reasonable. Can it really be suggested that the trial judge's view was sounder than the police officer's 'speculations'? Can it seriously be accepted that the unchallenged officer's view, formed during the interrogation and based on its atmosphere, on the nuances of the questions and answers, on the impalpable signs conveyed by the accused's demeanour and reactions (not all of which were easily describable as separate factual observations), is greatly inferior to that of the judge? Note that the judge's own inference is based on the police officers' observations. One cannot escape feeling that the Court of Appeal's support for the trial judge's finding was to some extent 'motivated' by its view of the 'inducement'. The court was of the opinion that even if the accused had confessed in the hope that the police would not interrogate his mother, his confession would still have been admissible. As Lord Lane LJ put it—

> 'Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law' (p 388).

The trouble with this view is, as Professor J C Smith points out in [1982] Crim LR 111, that it seems to be at odds with authority. In *DPP v Ping Lin* [1975] 3 All ER 175, Lord Morris placed the voluntariness test on the following footing: was the confession attained—

> '. . . as a result of something said or done by a person in authority that the accused was caused or led to make a statement? Did he make it because he was caused to fear that he would be prejudiced if he did not or because he was caused

to hope that he would have advantage if he did? The prosecution must show that the statement did not owe its origin to such a cause' (p 178).

To overcome this strict interpretation, Lord Lane CJ made an appeal to the 'spirit' of the rule, saying that the trial judge

> 'should understand the principle and the spirit behind it, and apply his common sense; . . . he should remind himself that "voluntary" in ordinary parlance means "of one's own free will"' (p 389).

It is doubtful whether it was ever possible to ascertain the 'spirit' of the voluntariness rule, but the task is certainly rendered much more onerous, for appellate and trial judges alike, by the *Pin Lin* case. For there the House of Lords stated that the voluntariness rule was so clear that there was no need to dwell upon its rationale. Lord Morris saw 'no necessity to re-examine or to consider the reasons which have been assigned as its justification or its basis . . .' (p 178). Lord Salmon dismissed such investigation as being 'an important philosophical question but for the present purposes . . . only of academic interest' (p 188). And Lord Hailsham regarded voluntariness an artificial rule which had been designed to protect the accused against dangers which no longer obtained. No rule of law, except the most technical one, can be found workable without an understanding of its rationale, or 'spirit', as the Court of Appeal prefers to call it. When the purpose of a rule is unclear then its scope is going to be unclear too. Should impropriety on the part of the person in authority matter? Should it matter that the inducement formed only part of the suspect's reason for confessing? Who should be regarded as person in authority? Does it matter that the admission was in fact true? Question such as these could receive a satisfactory answer only if we have a principle as well as a rule, and only if we know the purpose of the rule, its policy and its place in our system of criminal justice. None of these last matters has ever been clarified and it is this uncertainty which has produced the highly technical and artificial body of decisions prior to *Ping Lin*. For the only alternative to principle is strict technicality.

The indeterminacy of the voluntariness rule has deep roots for which the courts cannot be blamed. There is a profound tension between, on the one hand, the right of silence and, on the other hand, the need to convict the guilty and protect the community. If the right of silence is to be fully respected, then nothing should be allowed which undermines the accused's freedom to exercise it. Suspects should be effectively informed of their right, and not merely formally; they should be given easy access to solicitors; and the Judges' Rules should be enforced as a matter of law and not merely as a matter of discretion which is almost never exercised in favour of accused. But of course such measures would make it very difficult to obtain confessions from, and convictions of, the guilty. Instead police interrogation practices are designed to ensure, as the Royal Commission on Criminal Procedure has recently found, that suspects do not exercise their right of silence, with the result that the vast majority of suspects make statements when it is in their interest to keep silent. As long as we are not prepared to face this conflict, and revise our attitudes to the right of silence, as long as we refrain from open consideration of what are and what are not acceptable interrogation practices, the voluntariness rule will remain indeterminate and difficult in practice (and

the same is true of clause 60 of the proposed Police and Criminal Evidence Bill 1982). *Rennie* seems to point in the direction of a more realistic attitude towards what is and what is not acceptable pressure on suspects during interrogation. But it is unhappily inconsistent with *Ping Lin* where several of their Lordships indicated that had the 'inducement', which was similar in nature and effect to that in *Rennie*, been offered before the incriminating statement was made it would have rendered the statement inadmissible (see [1975] 3 All ER at pp 183, 186, 188, 189).

Self-incrimination

Perhaps it would not be inapposite to contrast the somewhat half-hearted protection of the right of silence in the police station with a new line of cases concerned with the right against self-incrimination in cross-examination. In *R v Stubbs* [1982] 1 All ER 424 and in *R v Winter* (1982) 74 Cr App R 16, the Court of Appeal decided that an accused's legal aid application form should not be used in cross-examination, or in questioning by the judge, for the purpose of discrediting the accused. In *Winter*, which came first, the trial judge put to the accused, who was being tried for a social security fraud, questions concerning statements he had made in his legal aid application. The answers proved, presumably, discreditable. The Court of Appeal quashed the conviction on the ground that the questions were unfair because the legal aid form was not evidence in the case. In *Stubbs*, again a fraud case, the Court of Appeal quashed the conviction: firstly, because it regarded *Winter* as authority for the proposition that legal aid applications should never be used for the purpose of cross-examination as to credit and, secondly, because

> 'if a witness were properly cross-examined on his legal aid application, then he would be entitled to be given the normal warning against incriminating himself' (p 427).

The reason for this is that it is an offence under s 23 of the Legal Aid Act 1974 to make false statements in applications under the Act. It is difficult to see why it should be regarded as unfair, especially in a fraud case, to show that the accused was prepared to commit fraud in relation to the very proceedings in which he is tried. True, the accused could assert his privilege against self-incrimination, as any other witness could, but having failed to do so it is difficult to see why his replies should be disregarded, especially as there is no rule that he must be given a warning any more than an ordinary witness need be given one. An accused could also forestall such questioning by relying on s 1(f) of the Criminal Evidence Act 1898 which forbids questions tending to show that he has committed other offences. The section might have applied in *Winter*, where it was not mentioned, though *Stubbs* came under the exception in s 1(f)(ii), since he had given evidence of his own good character and could have therefore been asked about other offences.

We must still consider in what way, quite apart from the privilege against self-incrimination and s 1(f), can examination on the legal aid form be considered unfair to the accused? Unfairness may arise from surprise, eg when the accused, being unprepared on the point, gives a confused or inadequate account when he could have provided a satisfactory one. Ques-

tioning may be unfair when it is likely to result in prejudice to the accused which outweighs the true discrediting effect of his answers. Rather than leave the matter to the discretion of the trial judge, to be exercised along such lines, the Court of Appeal opted for a strict rule, always forbidding examination on the legal aid application. Like many other strict rules which attempt to capture fairness in an a priori way, this rule is bound to result in acquittals which no principle of fairness demands. In *Stubbs* itself, by no stretch of the notion of fairness could the cross-examination have been considered unfair or unjustified or even avoidable. For if the accused says 'I had no need to cheat since my wife is rich', it would be the duty of the prosecutor to point out that the same accused, in a matter connected with the same proceedings, solemnly stated that his wife was poor. Indeed, what better deterrent can there be against misrepresentation in legal aid application? And is it not damaging to public respect for the judicial process that judges and prosecutors are now told to turn a blind eye to blatant deception? True, as the court pointed out in *Stubbs*, s 22 of the Legal Aid Act 1974, which applies only to civil legal aid situations, forbids disclosure of information contained in applications, except for the purposes of the legal aid authority. But the reason for this limitation, it is submitted, is the protection of the citizen's privacy, and it should not be extended so as to facilitate abuse.

See, further, *Khan v Khan* [1982] 1 All ER 60 and *Emanuel v Emanuel* [1982] 2 All ER 342 discussed at pp 218 and 220, post.

Evidence of a spouse

To buttress the privilege against self-incrimination of an accused the law extends the principle to the accused's spouse by means of rules of incompetence and incompellability. Thus a spouse is generally incompetent to give evidence for the prosecution, but there are exceptions. It has, however, been decided that when an exception applies the spouse remains uncompellable, albeit competent: *Leach v R* [1912]] AC 304, *R v Hoskyn* [1978] 2 All ER 136. The harmful effect of these decisions may now be observed in *R v Pitt* [1982] 3 All ER 63. The accused was charged with two counts of assault occasioning actual bodily harm on his 8 months' old daughter. On both occasions the baby suffered multiple injuries to her face and head. The accused's wife, who had made a statement to the police, implicating the accused, was called as witness for the prosecution. She proved reluctant and the prosecution was allowed to treat her as a hostile witness and cross-examine her. Having been convicted on one count, the accused appealed on the ground that a spouse, who is not compellable in the first place, should never be treated as a hostile witness. The Court of Appeal did not accept the argument and held that once a wife has waived her right not to testify and has started to give evidence, she was in the same position as any other witness and could no longer 'retreat behind the barrier of non-compellability if she is asked questions that she does not wish to answer' (p 66). It was, moreover, held that an evasive wife may be treated as a hostile witness if the occasion justifies it. The matter did not, however, end there, for the court went on to emphasise the importance of promoting marital harmony and, consequently, the need to ensure that a spouse is accorded a free choice in deciding whether to testify against the other spouse. For this reason the court endorsed Darling J's advice in *R v Acaster* (1912) 7 Cr App R 187, that before a wife takes the oath the judge should explain to her, in the jury's absence, that she has an option and satisfy

himself that she freely agrees to waive her right of refusing to give evidence. If the trial judge fails to ascertain that the wife approciated her position, then, Peter Pain J explained—

> '... the Court of Appeal may upset a verdict where it feels that injustice may have occurred because a wife gave evidence without appreciating that she had a right to refuse to do so' (p 66).

The Court of Appeal concluded that the wife in the present case did not sufficiently appreciate that she could refuse to testify and quashed the conviction (though a further reason for the result was that the jury may not have appreciated that the wife's statement to the police was not evidence of the facts stated therein).

This outcome is not likely to promote public confidence in our criminal process, considering the factual background of the case. It was not disputed that the accused was left at home with is baby daughter on the relvant occasions and that the baby suffered injuries. The accused, who did not give evidence, lay the blame on the other child of the family, a $2\frac{1}{2}$ year old boy, but there was circumstantial evidence that the boy was not responsible. Soon after the incidents the wife made a statement to the police in which she blamed the accused for the baby's injuries. She also went on to state that her husband had asked her to support his version of the incident and that when she refused her husband hit her. It was a pretty damning case, the only weakness of which was that the wife may not have appreciated her right to withhold her testimony. Endorsing the importance of this right Peter Pain J quoted Lord Salmon in *Hoskyn v Comr of Police for the Metropolis* [1978] 2 All ER 136, 149:

> '... there must ... be many cases when a wife who loved her husband completely forgave him, had no fear of further violence, and wished the marriage to continue and the pending prosecution to fail. It seems to me altogether inconsistent with the common law's attitude towards marriage that it should compel such a wife to give evidence against her husband and thereby probably destroy the marriage.'

This dictum is hardly apposite to the present case, for the question was not one of the wife forgiving offences committed against herself, but 'forgiving' offences committed against a defenceless baby. Should not the court's primary concern have been to safeguard children from brutality and physical danger? Even if we accept for the moment that non-compellability is important to marital welfare, the wife in this case demonstrated by her reluctance as a witness her 'loyalty' to her husband. In what way, then, was the quashing of the conviction still necessary for achieving matrimonial harmony?

The defect in the law is, however, deeper: it is embedded in the very notion of non-compellability. In the *Hoskyn* case, the court was concerned with the common law exception, whereby a wife is competent to testify against her husband about offences committed on her. In *Pitt* the exception was that arising from s 4(1) of the Criminal Evidence Act 1898 whereby spouses are competent to give evidence concerning offences committed against children. This situation is covered by *Leach v R* [1912] AC 305, in which the House of Lords held that s 4 removes incompetence but falls short of creating compellability. As many commentators have observed, none of these deci-

sions can be justified either morally or socially. Are we, then, to wait for the occurrence of an atrocity which would prompt the legislature to remove this judicial folly?

Public interest immunity

Let us now consider public interest immunity, a topic which in recent years has been the most turbulent, and possibly the least satisfactory, field of evidence. Hardly a year passes without some major battle of principle being fought, very often all the way up to the House of Lords. Many of these battles have drawn considerable public attention and the champions' fame has spread beyond the confines of the legal profession. *D v NSPCC* [1977] 1 All ER 589, *Burmah Oil v The Bank of England* [1979] 3 All ER 700, *British Steel Corporation v Granada Television* [1981] 1 All ER 417, to mention a few, have drawn general public controversy. The year under consideration is no exception. Two cases of note have emerged from the Court of Appeal, *Hehir v Comr of Police of the Metropolis* [1982] 2 All ER 335 and *Campbell v Tameside Metropolitan Borough Council* [1982] 2 All ER 791. As these cases have already been reviewed in (1983) 99 LQR 14 it is unnecessary to go into their ramifications here. It might, nonetheless, be useful to set out the background against which problems arising in this field should be considered (for general discussion see the essay 'Privilege and Public Interest' in *Crime, Proof and Punishment* (1980) ed C F Tapper, 248).

The modern law of public interest immunity derives mainly from the seminal decision in *Conway v Rimmer* [1968] 1 All ER 874, where the House of Lords overruled *Duncan v Cammel Laird* [1942] 1 All ER 587 and brought to an end the Crown privilege, whereby the courts were bound to exclude evidence if a minister of the Crown has objected to its disclosure and stated that disclosure would be contrary to the public interest. Instead the court took it upon itself to decide whether, in its own view, the withholding of information was truly necessary for the protection of the public. For this purpose the House of Lords instituted what has become known as the balancing process. On the one side of the scales the court has to place the harm to the public (usually to the proper functioning of the public services) likely to result from the disclosure of the information sought by the litigant, and on the other side of the scales the court must place the injury to the administration of justice likely to result from the withholding of the relevant information and, more specifically, the injustice which is likely to be inflicted on the individual litigant. The last point is of crucial importance, for here the court has to gauge the extent to which the withholding of the information could result in an incorrect factual conclusion and therefore in miscarriage of justice. We may call this the specific effect limb of the balancing process. This specific effect limb has a further corollary: it reduces the scope for binding precedent, because the specific effect of withholding evidence must vary according to the circumstances (according to the weight of the evidence in question and the relation it bears to the rest of the case). Since the specific effect of non-disclosure can never be determined in an a priori way, it follows that the outcome of the balancing process is also not determinable in advance and, consequently, cannot be the subject of binding precedent, yet the courts have shown considerable reluctance to implement the specific effect limb and

its corollary. In the *Hehir* case, for instance, the Court of Appeal felt constrained by authority to decide that information, gathered for the purpose of a police investigation under s 49 of the Police Act 1964, was immune for production as a matter of general law and refrained from considering what specific effects the information could have on the outcome of the litigation. This neglect of the specific effect consideration is, unfortunately, by no means isolated.

Were our problems confined to an imperfect application of the balancing process, there would not have been much cause for concern, but sadly they are not. When *Duncan v Cammel Laird* reigned supreme the scope of the public interest was somewhat contained, for it could only be asserted by the Crown for the protection of the main functions of government. *Conway v Rimmer* has quite unexpectedly put in train a philosophy which has been used to extend the scope for withholding evidence far beyond the main functions of government. In *D v NSPCC* [1977] 1 All ER 589, public interest immunity was accorded to information in the hands of the National Society for the Prevention of Cruelty to Children, in the interest of child welfare. A similar privilege was accorded for documents in the hands of the social services of a city council in *Gaskin v Liverpool City Council* [1980] 1 WLR 1549. In both these cases immunity from production prevented access to documents upon which the plaintiffs' chances for success rested and thus inexorably resulted in the dismissal of the actions, but this result was in no way considered objectionable. Yet in *Campbell v Tameside Metropolitan Borough Council* [1982] 2 All ER 791 the Court of Appeal was quite willing to consider the specific effect of non-disclosure on the plaintiff's case, and it refused to accord privilege even though the ground for the claim, the welfare of child education, was similar to that advanced in the previous two cases. At times one cannot escape feeling that there is a further consideration which is placed on the scales—the personal merits of the party seeking discovery. If he is meritorious, as he was considered to be in *Campbell*, the specific effect of non-disclosure will be taken into consideration. If he is considered unmeritorious, as he was presumably though to be in the *NSPCC* and *Gaskin* cases (and see also *Rogers v The Home Office* [1977] 2 All ER 1057), the evidence will be withheld from production no matter how devasting the non-disclosure will be on the party's case. Equality before the law seems to be exhausted when it comes to proceedings for discovery, for the courts seem willing in all discovery proceedings to lend an ear to claims that this or that evidence should be withheld from production in the public interest. The limited discretion, which the courts have always had in discovery for the purpose of preventing abuse, has assumed a different nature. It has been a discrètion to weigh the amorphous and loosely defined benefits which the public is likely to derive from non-disclosure, against the likely harm to the litigant, if he be otherwise meritorious; see for example *Science Research Council v Nosse* [1979] 3 All ER 673.

The courts seem to have lost sight of the fact that, in overturning the Crown privilege, *Conway v Rimmer* meant to facilitate greater access to evidence and reduce the situations in which relevant evidence is withheld from the courts. Instead litigants' confidence that they would receive the courts' help in securing all relevant information is reduced with the publication of almost every new volume of law reports, and litigants' right of access to evidence is continually becoming insecure.

Extradition

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1 Foreign trials in absentia: convicted or accused?

Extradition may be sought of a person convicted and sentenced, so that he may be returned to serve that sentence, or of a person accused of an offence, so that he may be returned to stand his trial. In the former case, it is only necessary to furnish formal proof of the conviction; in the latter, evidence such as would justify committal for trial in England must be provided (Extradition Act 1870 s 10). A person convicted of 'contumacy' may be treated only as an accused person for the purpose of a request from a foreign State (ibid s 26), but the statute leaves that term undefined.

The essence of a conviction *in contumacia* in Continental criminal law is that it is provisional, the accused person having been tried and convicted in his absence, but with the right to re-open or challenge those proceedings on his surrender. This was the position in Italy until 1931 when a new code of criminal procedure provided for trial and appeal in respect of absent defendants but made those proceedings final. The description *in contumacia*, however, was retained.

Zezza had been convicted in his absence of armed robbery in Italy in 1975. In 1976 his sentence was reduced on appeal, again in his absence. In 1979 the appeal court by way of amnesty remitted a further year of the sentence. Now in England, his surrender was requested by the Italian government as a convicted person with a six-year prison sentence to serve, notwithstanding the description of that procedure as '*in contumacia*'. Zezza insisted that since his conviction was for contumacy, he could not be regarded as a convicted person under the Extradition Act or the relevant treaty, which contained a similar exclusion of extradition for contumacy. He sought habeas corpus and the matter came finally before the House of Lords: *Zezza v Government of Italy* [1982] 2 All ER 513.

The applicant argued that it was not permissible to look behind the phrase. The conviction was for contumacy and could not therefore lead to extradition as a convicted person. The terminology was all.

The House of Lords rejected the submission. There was authority to the effect that the true nature of the foreign proceedings could be ascertained (*Re Coppin* (1866) LR 2 Ch App 47), a decision to which statutory effect was in fact given by s 26 of the Extradition Act 1870, ensuring that a person convicted in contumacy was to be treated as an accused person. The magistrate was to discover the real nature of the proceedings so that provisional or conditional conviction, re-opened or reviewed on surrender or appearance, was in fact a conviction *in contumacia* and such a person fell in the category of an accused person. Similarly, a person, though the conviction was stated in the foreign law to be *in contumacia*, was indeed a convicted person if that description was devoid of significance and the conviction was indeed final. Zezza's conviction was indeed final and could not be regarded as one for contumacy. Habeas corpus was therefore refused.

The paradox of course is that a person may be returned by English courts to serve a sentence imposed in his absence in a foreign country when no such trial could have taken place here. The very idea of a trial in absentia on serious charges is anathema to us. That was presumably a consideration when Parliament in establishing arrangements for extradition in the last century declined to have persons convicted *in contumacia* treated as convicted persons. If a foreign State made its procedures even less fair by our standards by removing the right to re-open the proceedings on return, the *in contumacia* characterisation disappeared and there was accordingly no impediment to treating as convicted such persons. It is not possible to look behind a certificate of conviction to see if the foreign trial conformed to the rules of natural justice (*Royal Government of Greece v Brixton Prison Governor* [1969] 3 All ER 1337, HL) so that our courts give effect to criminal convictions overseas reached in circumstances that would not have taken place here. In the review of extradition law initiated by the Home Office, this discordance cries out for attention. We shrink from trying serious offences in the absence of defendants here, yet recognise and give effect to such trials elsewhere. Is it not incongruous?

2 Is death by reckless driving manslaughter?

Gail Jennings, then aged 17, was visiting California. While driving there, her car struck a boy cyclist who later died from his injuries. She was charged with 'felony drunk driving' and released on bail. Just over a fortnight later, in breach of her bail, she left the United States and returned to England. An amended charge of manslaughter by gross negligence was later filed against her, in respect of which her extradition from Britain was in due course sought. Could Miss Jennings be extradited on these facts? Her principal contention was that she had committed no extradition offence, since, although manslaughter was extraditable, her conduct under English law amounted only to the offence of causing death by reckless driving, which was not. (Other arguments in the case are not of wider significance and will not be considered here.) The Divisional Court accepted her submission and granted habeas corpus (*Jennings v United States Government* [1982] 3 All ER 104) but an appeal to the House of Lords by the United States Government was successful (ibid).

According to the respondent (Miss Jennings), unlawful killing by reckless driving had not amounted to manslaughter in England since 1956 or possibly 1977. In 1956, a statutory offence of causing death by reckless or dangerous driving was created; this was amended in 1977 by the deletion of 'dangerous'. These statutory offences are not extraditable. In *Andrews v DPP* [1937] 2 All ER 552, the House of Lords held that not every death resulting from dangerous driving amounted to manslaughter, since the negligence involved might not be of such a degree as was required for manslaughter. If the driving were reckless, then manslaughter was committed. Charges of 'motor manslaughter', as it was known, on which juries had been so reluctant to convict and for which reason the 1956 statutory provision was introduced, all but disappeared. Counsel maintained that the relevant part of the common law of manslaughter had been impliedly repealed by the 1956 statute and, even if that were not so, it had certainly been repealed when s 50 of the Criminal Law

Act 1977 abolished the offence of causing death by dangerous driving, leaving only causing death by reckless driving, which was synonymous with the old common law offence of 'motor manslaughter'. Parliament, he argued, could not have intended two offences, one at common law and the other statutory, to co-exist. He pointed, too, to the disparate penalties: manslaughter was punishable by a maximum of life imprisonment, causing death by reckless driving by five years' imprisonment.

Lord Roskill, speaking for a unanimous committee, carefully reviewed the legislative history up to 1977, beginning with the Motor Car Act 1903, which first introduced offences of reckless, negligent and dangerous driving. This was followed by the Road Traffic Act 1930 which in substance preserved the 1903 offence while adding a new lesser offence of careless driving. Counsel's argument as to the effect of the 1956 Act on 'motor manslaughter' had to accommodate the fact that a schedule to that very Act provided for disqualification and endorsements not only for the statutory offences but also for 'manslaughter by the driving of a motor vehicle'. Later statutes contained similar references. Counsel's explanation was that the statutory offences applied only to driving 'on a road' and the common law offence of manslaughter necessarily survived in relation to driving other than 'on a road', or where the car had been used as a deliberate instrument of attack or of causing fright. Lord Roskill, however, found the many statutory references to manslaughter in the context of driving offences and Parliament's failure to have repealed it expressly as evidence that it had not been the legislature's intention to do away with 'motor manslaughter', though such a prosecution would doubtless arise only in a very grave case. Lord Roskill concluded by observing that the wide spectrum of cases embraced by offences of manslaughter at common law made it desirable that the offence with its infinite flexibility should not be fragmented.

The magistrate's order of committal was therefore restored and the Home Secretary in due course effected Miss Jennings' return to California, where she was convicted and imprisoned, over four years after the offence had been committed.

3 Admissibility of unsworn evidence

Sweden sought the extradition of two men from England to face drugs charges. Evidence was put before the magistrate who found that there was a case to answer and committed the two men to prison to await extradition. Part of the evidence adduced was a statement made to the Swedish police incriminating the two men and a record of proceedings in a Swedish court relating to that statement. Under the Extradition Acts, depositions or statements on oath and affirmations taken in a foreign State (s 14 of the 1870 Act and s 4 of the 1873 Act) may be received in evidence. In *R v Governor of Pentonville Prison, ex p Passingham* [1982] 3 All ER 1012, the two men challenged their committal and sought habeas corpus on the ground that the statements tendered in evidence did not meet the requirements of the Acts in that they were not taken on oath or by way of affirmation and should not therefore have been admitted by the magistrate.

The informant in Sweden had given information to the Swedish police about the two men in England and had given evidence to the same effect in a

Swedish court. Records of both were before the magistrate. Under Swedish law, it is an offence to tell the police during a pre-trial investigation that another person has committed a criminal act, but a co-defendant may not swear an oath when examined by a court in order to substantiate an indictment against a co-defendant, and any such statements, if false, are not punishable. In the Swedish court, the informant was reminded by the judge that he could face up to two years' imprisonment if his statements to the police were untrue, but that no penalties attached to anything said to that effect in court since he was not under oath, but that nevertheless he should speak truthfully. On these facts the two men contended that the statements, not being on oath or by affirmation, were inadmissible in the English extradition proceedings: clearly no oaths had been taken and an affirmation presupposed a sanction for falsehood.

Griffiths LJ in the Divisional Court, explaining that the purpose of ss 4 and 13 of the Acts was to avoid having to bring witnesses to England if their evidence had been given in their own country in circumstances of such formal solemnity that they would have realised the gravity of the occasion and the importance that their testimony should be true, felt it safe to use and act on such evidence, particularly as the formal threat of a prosecution for perjury made little difference in practice. Such a consequence, in the court's view, was not necessary for a statement to be regarded as an affirmation. A statement can become an affirmation by 'its adoption in circumstances which recognise the gravity and importance of the truth being told on the particular occasion' (*R v Governor of Pentonville, ex p Singh* [1981] 3 All ER 23 at 27, per Ackner LJ). In view of the circumstances in which the two statements were made, the court had no doubt that the statements were affirmations and the evidence was properly admitted.

The judgment makes for convenience, but it may be doubted whether a nineteenth-century statute extending an earlier statute dealing with evidence on oath by adding to it affirmations was meant to cover any statement made on a solemn occasion where the importance of speaking truthfully was emphasised. The meaning of affirmation in this context must be coloured by the traditional meaning and consequences of evidence given on oath. The present case may not stray too far from the statutory language, since the statement to the police was backed by a sanction in respect of falsity and its subsequent adoption took place in court, but there is a danger that this decision may be taken further and lead to the admission of statements made when there was no sanction and other than in a court of law. Bearing in mind that such evidence may lead to detention pending surrender and then forcible return to face trial in another country, this would be highly undesirable. It is not, as it might appear at first, a mere technicality of evidence. In short, the decision in *ex p Passingham* is probably right: the ratio is suspect.

An appeal to the House of Lords has since been dismissed, the House preferring a narrower and less objectionable definition: [1983] 2 All ER 123.

Family Law

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Introduction

The cases under review tended more to expose anomalies in the law and ambiguities in the interpretation of statutes than to develop or change the legal principles. The impression given by some judgments was that defects in certain areas, notably divorce and child care proceedings, could not be further cured by judicial innovation and construction but only by legislative intervention. Some of these areas are already under review by the Law Commission, to whose reports reference will be made where appropriate.

The reported cases are grouped according to topic.

1 Formation and annulment of marriage

The modern concern to adapt English matrimonial law to the reasonable requirements of the immigrant population is reflected in the issues posed by *Hussain v Hussain* [1982] 3 All ER 369, CA. Mr Hussain, domiciled in England, went to Pakistan to marry a woman domiciled there in a Muslim ceremony. He sought to challenge the jurisdiction of the court to entertain the wife's petition for judicial separation filed in England on the ground that the marriage was potentially polygamous and therefore void within s 11(*d*) of the Matrimonial Causes Act 1973.

Although s 11(*d*) had indeed generally been taken to have the effect for which the husband contended, the opposite view prevailed in the decision. Prior to the passing of the Matrimonial Proceedings (Polygamous Marriages) Act 1972 English courts possessed no jurisdiction to deal with marriages other than monogamous relationships and the nature of marriages in question was determined by reference to the lex loci celebrationis. Since the 1972 Act, however, a court is not precluded from granting relief by reason only that the marriage in question was entered into under a law which permits polygamy while s 11(*b*) and (*d*) of the Matrimonial Causes Act provides for a decree of nullity where a marriage is actually or potentially polygamous, with the result that attention has shifted to the question whether a marriage is in fact polygamous or potentially polygamous and away from the disputes about theory. In *Hussain* Ormrod LJ was persuaded by the argument of counsel for the wife that the marriage could not be potentially polygamous: since the wife was prohibited by her personal law from taking additional spouses and the husband was forbidden to do so by the law of his domicile, the marriage was not void. The determining factor was said to be the capacity of the parties, so that if one of them retained the capacity to take a second spouse, as would be the case if a woman domiciled here married in Pakistan a man who could take additional wives, the marriage would be void (at 372 d). The capacity of the parties appears to have been treated as governed by ante-nuptial domicile and not by the alternative

test, that of the intended matrimonial home (*Radwan v Radwan (No 2)* [1972] 3 All ER 1026, Fam D). Ormrod LJ showed himself well aware of the problems that would be caused in a 'pluralistic society' if all marriages contracted abroad by Muslims domiciled here were automatically void (at 372 g), a result avoided by his judgment. Similar concern was shown for arranged marriages between Sikhs in *Singh v Singh* [1971] 2 All ER 828, CA.

The judgment in *Hussain* disregards the traditional view that the lex loci celebrationis and not the personal law of the parties continues to determine the character of the marriage, a view said to be shaped by the history of lack of jurisdiction over polygamous marriages. Ormrod LJ's judgment claimed the dual virtues of preservation of the concept of monogamy for British domiciliaries and freedom of choice and religion for Muslims. The claim is confirmed by the conclusions of the English and Scottish Law Commissions in a 1982 paper *Polygamous Marriages: Capacity to Contract a Polygamous Marriage and the Concept of the Potentially Polygamous Marriage* (Working Paper no 83; Consultative Memorandum no 56). The novelty of the judgment in *Hussain* may be gauged from the fact that the Law Commissions' study, prepared before the judgment was reported, was based on the assumption that a marriage contracted abroad in polygamous form by a man domiciled here would be void and was intended to change the law because it gave rise to proven difficulties.

The judgment in *Hussain*, which is still subject to the risk of being reversed or overruled by the House of Lords, leaves anomalies in its wake, such as the sex discrimination consequent upon Muslim law alluded to above and its inapplicability in Scots law. The Law Commissions provisionally recommended that it should be made clear by statute that a person domiciled in England and Wales, or in Scotland, has the capacity to contract a marriage even though celebrated in a form which, under the law of the place of celebration, permits polygamy, provided the marriage was not actually polygamous.

For completely different reasons the petitioner in *Vervaeke v Smith (Messina and A-G intervening)* [1982] 2 All ER 144, HL, also sought to establish the invalidity of a marriage. In 1954 Marie Vervaeke, a Belgian spinster and prostitute, went through a marriage ceremony with Smith for the sole purpose of acquiring British nationality and avoiding deportation. While Smith was still alive, Vervaeke married her employer, Messina, in Italy. Messina died at the wedding reception, leaving considerable property in England which could be claimed by Vervaeke if she were his widow. This claim depended on the invalidity of her earlier marriage to Smith, which she failed to establish (after intervention by the Queen's Proctor) in *Messina (formerly Smith otherwise Vervaeke) v Smith (Messina intervening)* [1971] 2 All ER 1046, PDA. Subsequently she had turned to the Belgian courts and there had succeeded in obtaining a declaration of nullity in relation to the marriage to Smith on the ground that the marriage was a sham, undertaken for limited purposes and, according to Belgian public policy, not deserving of recognition. Armed with the Belgian decree in her favour, Vervaeke sought a declaration that it should be recognised in England and also a declaration by virtue of s 45 of the Matrimonial Causes Act 1973 that the marriage to Messina was valid. Lords Hailsham, Simon and Brandon dismissed her appeal on the grounds of public policy and res judicata; Lords Keith and

Diplock on the latter ground alone, all agreeing that both grounds are exceptions to the general rule that foreign judgments should be recognised. The 1971 judgment of Ormrod J (as he then was) was regarded as conclusive on the point that a marriage for ulterior motives was nonetheless valid, even though this issue had then been a minor one.

The novel and interesting aspect of the House of Lords' decision lies in the question of public policy. Belgian public policy is that sham marriages should be treated as invalid, English policy that they are valid, and either approach is reasonably supportable. Lord Simon dealt most fully with this point and, while emphasising that it should only be with reserve that English courts reject foreign decrees, saw no reasons in the case why English policy should defer to Belgian attitudes to marriage. Thus the court departed from the *Indyka v Indyka* [1967] 2 All ER 689, HL, spirit of avoiding limping marriages and added another instance to that small and heavily criticised category of cases, exemplified by *Formosa v Formosa* [1962] 3 All ER 419, CA, where foreign judgments have been rejected on their merits.

It is questionable whether any real injustice would have resulted if the Belgian decree of nullity had been recognised by the House of Lords, all the more so if the rapacious nature of the rival claimants to Messina's property can be put to one side. Vervaeke's connection with Belgium was as substantial as her connection with England and the judgment resulted in the setting aside of laws of a fellow member state of the EEC. It is hard to escape the conclusion that the petitioner's history affected the decision, especially if it is compared with *Szechter (otherwise Karsov) v Szechter* [1970] 3 All ER 905, PDA, and *H (otherwise D) v H* [1953] 2 All ER 1229, PDA. Those marriages were undertaken for the limited purposes of escape from unpleasant régimes and were held void on the ground of duress, despite the fact that the fear alleged was of the régime and not directly connected with the ceremony itself. In *Vervaeke* the motives for the 1954 marriage were regarded as reprehensible and it was ultimately held valid; in *Szechter* and in *H* the motives were regarded as laudable and the marriages avoided when their purposes had been served.

Hussain and *Vervaeke* raise complex issues of conflict of laws which it may be possible to settle only by national and international legislation.

2 Cohabitation

There is increased litigation of property questions between former cohabitants. The applicable principles are in the process of clarification and assimilation to those that govern the married, principles developed formerly under s 30 of the Law of Property Act 1925 and now under s 24 of the Matrimonial Causes Act 1973. When cohabiting couples are joint owners of property, disputes over sale and its proceeds after the relationship has ended fall to be determined by the principles evolved under s 30 of the Law of Property Act. When dealing with married joint tenants the court used either to refuse a sale requested by one of the spouses because there remained a good reason for keeping the house (*Bedson v Bedson* [1965] 3 All ER 307, CA) or to order sale because the purpose of the joint tenancy was at an end (*Jones v Challenger* [1960] 1 All ER 785, CA; *Rawlings v Rawlings* [1964] 2 All ER 804, CA). Only under the aegis of special matrimonial legislation was the Divorce Court able

to develop a compromise solution of delayed sale on terms, a flexibility which was extended first to encompass applications for sale under s 30 by a husband's trustee in bankruptcy (*Re Holliday (a bankrupt) ex p the trustee of the bankrupt v The bankrupt and another* [1980] 3 All ER 385, CA) and then to cohabitants (*Re Evers's Trust, Papps v Evers* [1980] 3 All ER 300, CA). The notion was taken a stage further in *Dennis v McDonald* [1981] 2 All ER 632, Fam D. Purchas J refused to make an order for sale on the application of the woman joint tenant of the house which had been shared with the man joint tenant, he having remained there with three children. Because the woman had been ousted from her property by the man's violence, Purchas J felt able to depart from the usual rule of land law (*Jones (A E) v Jones (F W)* [1977] 2 All ER 231, CA) that one tenant in common was not liable to pay rent to another tenant in common in respect of his sole occupancy, and ordered the man to pay to the woman an 'occupation rent' equivalent to one half of the fair rent payable for an unfurnished letting of the house assessed on the principles for valuation of regulated tenancies in s 70 of the Rent Act 1977. In *Dennis v McDonald* [1982] 1 All ER 590, CA, the man appealed against this method of assessment. He contended that because he was giving a home to three of the five children involved there should be an unequal enjoyment of the notional rental proceeds of the house and that he should pay correspondingly less. The judgment of the Court of Appeal considered the nature of the payment to be made as well as its calculation. Whereas Purchas J had described it as an occupation rent, Arnold P defined the payment as some sort of compensation to be paid by a trustee to a beneficiary for breach of trust. It followed that the purpose to which the payer put the property was irrelevant: he was deemed to be paying for the exclusivity of his occupation rather than for his share of the burdens generated by the former relationship and so the fraction should remain at one-half. The problems of precise application of s 70 of the Rent Act were resolved first by eliminating both the scarcity element and also the requirement in s 70(3) to disregard certain disrepairs and improvements that might have occurred and then by simply assessing a fair rent for the property.

The apparent advantages of this notion of compensation or occupation rent were such that it was adopted by Purchas J for a married couple in *Harvey v Harvey* [1982] 1 All ER 693, CA, infra. If generally advocated as a solution it is likely to result in far fewer orders for immediate sale of jointly owned property because it provides some reward, if not the desired lump sum, for the non-occupier and it takes account of the needs of children. The later case of *Harvey* took a very broad approach to the technical requirement of ouster but there can be no doubt of its satisfaction in *Dennis* as violence had been used against the woman.

A method of assessment of rent that reflected the actual distribution of responsibilities between the owners might in fact be more appropriate than the even-handed approach of the Court of Appeal in *Dennis*. In either case the new solution of occupation rent provides something akin to the payment of maintenance to a former mistress and would not adapt well to the situation of a female joint tenant and children who remained in the former shared home. There it is more likely that the man would be expected to pay for the upkeep of the children than that she would be required to pay rent.

Bernard v Josephs [1982] 3 All ER 162, CA, concerned a jointly owned property which had been occupied by the two parties but was now the home only of the defendant and his wife. The plaintiff sought an order for sale and a declaration that she was entitled to half the proceeds. The trial judge ordered sale and equal division of proceeds, treating the purpose for which the house had been acquired as at an end. The defendant appealed and, as the plaintiff had by then agreed not to insist on sale provided that the defendant purchased her share, the judgments in the Court of Appeal were directed mainly towards assessment of shares. No express declaration of trust had been made when the property was acquired and Griffiths LJ took the opportunity of reminding solicitors of the wisdom of making such a declaration (at 170 d–e) in order to avoid litigation likely to result in a major share of the proceeds going towards repayment of legal aid.

All the members of the court agreed that where there was no express declaration of trust there was no presumption of equal shares. They then differed over the ascertainment of the shares, Griffiths LJ taking the more conservative attitude that shares were determined by the intentions of the parties at the time of purchase as evidenced by contributions then and subsequently, while Lord Denning MR and Kerr LJ held that shares should be ascertained at the date of separation by assessment of the respective contributions up to that date and even subsequent to it. All concurred in finding on the facts that the parties should have equal shares in the house.

The parties in *Bernard v Josephs* had once been engaged, albeit at a time when the man was still married, but the court did not explore the extent to which s 2(1) of the Law Reform (Miscellaneous Provisions) Act 1970 applied the property adjustment provisions of the Matrimonial Causes Act to engaged couples. Nevertheless, even more strongly and explicitly than in *Dennis*, the Court of Appeal applied to the unmarried the principles that normally govern the determination of the legal disputes of married persons. Griffiths and Kerr LJJ would have qualified this only by the need for the court to be satisfied that the relationship between the parties involved the same degree of commitment as a marriage, while Lord Denning MR would have gone so far as to remit cohabitants' property cases to the Family Division (at 168 j).

These sentiments, however, beg the question whether the laws of marriage and divorce should be applied at all to the unmarried and, if so, whether the degree of commitment can be judicially determined. In a sense the property laws must be the same for the two categories because there is no special property régime for the married in this country apart from some legal presumptions that may still operate in favour of a wife. By the assimilation process is meant the extension to the unmarried via s 30 of the Law of Property Act of the discretionary principles of property transfer worked out in the context of divorce. By legislative design s 24 of the Matrimonial Causes Act contains a wider array of powers than s 30 and it is not necessarily just or self-evident that disputes over title between former cohabitants should be settled as if they were spouses dissolving a marriage. The arrangements and intentions of the former cohabitants may have been quite different from those of the married couple and, as illustrated by *Bernard*, the assimilation approach cannot reconcile the conflicting claims of former mistress and current wife on the one home.

3 Use and occupation of the matrimonial home

Barnett v Hassett [1982] 1 All ER 80, Fam D, resulted in a fresh limitation on the use of the Class F charge under the provisions of the Matrimonial Homes Act 1967. On the breakdown of a very short marriage the husband moved out of the house owned by the wife into rented accommodation, with no intention or need to return. After the wife had exchanged contracts with an intending purchaser of her home the husband registered a Class F charge. He claimed that before the breakdown the wife had promised to share the expenses of the purchase of a new matrimonial home, a purchase aborted by the breakdown, leaving him with substantial losses, and that in order to protect his position regarding those losses he was entitled to freeze part of the proceeds of sale of the wife's house by registering the Class F charge. Wood J granted the wife's application to set aside the charge and described the registration in the circumstances of the present case as not a proper use of the process set up by the 1967 Act (at 84 a). The emphasis of the 1967 Act, according to Wood J, is to create and protect the right to occupation of a spouse, not to the proceeds of sale, and the husband admittedly did not wish to occupy or even to prevent sale.

Prima facie the husband was entitled to register the Class F charge even if he was out of occupation and temporarily lacking the intention to return (*Watts v Waller* [1972] 3 All ER 257, CA). However, a more appropriate method of freezing assets is to be found in s 37(2) of the Matrimonial Causes Act 1973 which provides for the prevention of disposals and the setting aside of unwarranted dispositions but only after the commencement of proceedings for financial relief and if made with the intention of defeating a claim, conditions not fulfilled in *Barnett v Hassett*.

The most important cases under this head have concerned the circumstances that must be established by a wife (or husband) seeking an order to evict a spouse from the matrimonial home, whether this be under the provisions of the Matrimonial Homes Act 1967, the Domestic Violence and Matrimonial Proceedings Act 1976, the Domestic Proceedings and Magistrates' Courts Act 1978 or in the course of proceedings. Two Court of Appeal decisions are in direct conflict on the requirements. In *Myers v Myers* [1982] 1 All ER 776, CA, the wife and small child left the matrimonial home and went to live in very cramped conditions elsewhere. She applied for an order excluding the husband from the home so that she could return to it and she established acts of violence by the husband. In *Samson v Samson* [1982] 1 All ER 780, CA, the wife and two small children also left the home and went to live elsewhere in overcrowded accommodation. She applied for an order excluding the husband from the home, giving as her reason only that she could not bear to be with him in the same house. Mrs Myers' application failed and Mrs Samson's succeeded. In *Myers* the test applied by Arnold P was that the applicant's decision not to return to the home containing the husband must be genuine (which it was) and reasonable in relation to the personalities involved, which it was held not to be. *Elsworth v Elsworth* (1979) Fam Law 21, CA, was followed, a case in which Orr LJ had described the proper question as being whether there was any good reason why the wife should not return to the home, mere reluctance to do so being insufficient. In *Samson* Ormrod LJ granted the exclusion order, preferring to consider the matter on a strictly

practical basis, looking first to the welfare of the children and being very largely guided by it (at 783 j). He expressed disapproval of *Elsworth* and pointed out that the two leading cases on the subject (in his opinion), *Bassett v Bassett* [1975] 1 All ER 513, CA and *Walker v Walker* [1978] 3 All ER 141, CA, had not been referred to by Arnold P in *Myers* and that these leading cases supported the practical and welfare approach rather than the requirement of some behaviour justifying eviction as evinced in *Elsworth* and *Myers*.

The report of *Elsworth* shows that the trial judge had in fact considered *Walker* and that this decision was distinguished by Orr LJ in the Court of Appeal, while both the leading cases were cited to the court in *Myers*. Only the House of Lords can now decide whether or not it is necessary for a wife to establish a good reason for refusing to live together with her husband in the matrimonial home and seeking his exclusion. There is a risk that justice may not be seen to be done if a husband is evicted from his home for no obvious reason, all the more so when an eviction order at an early stage in the breakdown of a marriage will undoubtedly have the consequence of lessening the chances of reconciliation and of greatly strengthening a wife's claims to transfer of the home and to custody of the children in later divorce proceedings. For these reasons it is submitted that the *Myers* line of cases is to be preferred.

In *O'Malley v O'Malley* [1982] 2 All ER 112, CA, as if to underline this point, Ormrod LJ condemned the use of the injunction procedure to improve the standing of one party in relation to ancillary relief procedures and refused the application of the wife for an ouster injunction in circumstances where the couple were still living under one roof after decree absolute. The fact that ancillary relief proceedings were still pending afforded jurisdiction to make such an order but the court expressed reluctance to do so after decree absolute unless the circumstances were compelling. Mrs O'Malley was said to have the rights only of an independent adult licensee; no doubt the conclusion would have been different had she had the custody of minor children.

In *Horner v Horner* [1982] 2 All ER 495, CA, the powers of the county court and the magistrates' courts to grant injunctions were compared. The Court of Appeal established that the word 'molesting' in s 1(1)(*a*) of the Domestic Violence and Matrimonial Proceedings Act 1976 was apt to cover any harassment calling for the court's intervention, whereas the magistrates were limited by s 16 of the Domestic Proceedings and Magistrates' Court Act 1978 to dealing with cases of actual or threatened violence. There was a call for restraint in attaching powers of arrest to injunctions granted by either court. The power was described by Ormrod LJ as very serious and he deprecated any automatic use of it (at 498 b). The conclusion to be drawn is that the restrictions on the magistrates' powers are such that injunctions are nearly always more conveniently obtained from the county courts either as part of divorce proceedings or in exercise of the jurisdiction conferred by the Domestic Violence and Matrimonial Proceedings Act.

In *Head v Head* [1982] 3 All ER 14, Fam D, the husband had twice broken an order made under the 1978 Act with powers of arrest attached and was committed by the justices for two consecutive periods of six weeks. On appeal by the husband it was held that s 63(3) of the Magistrates' Courts Act 1980 did not allow for consecutive running and that such committals, unlike imprisonment, must take effect on the day on which ordered. Sheldon and

Reeve JJ agreed that it was extremely desirable that the justices should produce a note of the evidence given before them on which they decided to make an order under the 1978 Act or a subsequent committal, for use in case of appeal.

4 Magistrates' domestic jurisdiction

In *Burridge v Burridge* [1982] 3 All ER 80, Fam D, an unemployed husband appealed against an order that he pay to his wife a lump sum of £500, the maximum permitted by s 2(3) of the Domestic Proceedings and Magistrates' Courts Act 1978, and £125 to each of the two children, the lump sums to be paid in weekly instalments. His grounds were that no such order should have been made given that he had no resources and that in any case the total of the lump sums payable exceeded the £500 limit. Anthony Lincoln J refused to apply the dictum of Lord Denning MR in *Wachtel v Wachtel* [1973] 1 All ER 829, CA: 'No order should be made for a lump sum unless the husband has capital assets out of which to pay it—without crippling his earning power' (at 840), so as to circumscribe the apparently unlimited power of the magistrates in s 2(2) of the 1978 Act to order lump sum payments to cover debts incurred before the hearing. The judge also held that the children had a separate entitlement to a lump sum under s 2(2) so that the £500 limit had not been breached. Nevertheless the case was remitted to the magistrates with a view to variation or reduction of the instalments if the husband were still genuinely unable to find employment. The judge was not prepared to accept the argument, based on *Williams (L A) v Williams (E M)* [1974] 3 All ER 377, Fam D, that receipt of supplementary benefit was conclusive proof that the husband was not working. Rising rates of unemployment are likely to affect a high proportion of respondents in the magistrates' courts and it must be a matter of concern when courts take a view of a man's actual income and working capacity differing from that taken by the Supplementary Benefits Commission. The 1978 Act presents some parallels with the ancillary relief provisions of the Matrimonial Causes Act 1973 and it is therefore unlikely that it was intended that the upper limit of £500 should in fact be exceeded or that persons without capital should pay lump sums.

5 Divorce

The impact of Special Procedure is now so profound that no cases on the substantive law were reported in the year under review. The dearth of cases is due to the fact that the undefended divorce receives no hearing and that it is rare for any divorce to reach trial. The case law on the grounds of divorce appears to have crystallised at the date of general introduction of Special Procedure in 1977.

Fay v Fay [1982] 2 All ER 922, HL, concerned an area where hearings are still required, namely, the bar on the granting of divorces during the first three years of marriage. Mrs Fay appealed unsuccessfully to the House of Lords from the refusal of lower courts to grant her leave to petition for divorce on the ground of exceptional hardship. By virtue of s 3(2) of the Matrimonial Causes Act leave may be granted only if the petitioner suffers exceptional hardship or the respondent displays exceptional depravity: the

latter limb of the subsection is rarely relied on and is normally unnecessary for a case of exceptional depravity must surely entail the suffering of exceptional hardship. It is clear from the judgment of Lord Scarman that the petitioner must show that she has suffered and that the hardship must be exceptional; but beyond saying that what is 'exceptional' must be judged by prevailing standards of acceptable behaviour between spouses (at 928 b), Lord Scarman declined to offer a more precise definition because the intention of Parliament seemed to him to be to entrust the trial judge with the decision and the discretion in each case on its facts and the appellate court should intervene only when he is plainly wrong. Rule 5 of the Matrimonial Causes Rules 1977, requiring the application for leave to be accompanied by a copy of the proposed petition and certain other particulars was held to do no more than state a minimum requirement and, in addition, evidence of the extent of the suffering, such as ill health, stress or mental breakdown and circumstances illustrating its exceptional nature will be required. It was insufficient for Mrs Fay to exhibit only the particulars of unreasonable behaviour in the proposed petition. Their Lordships approved *Hillier v Hillier and Latham* [1958] 2 All ER 261, CA, a case where the husband applicant had suffered a nervous breakdown and his future hardship was taken into account, also *C v C* [1979] 1 All ER 556, CA, where, as in *Hillier*, the Court of Appeal had allowed further evidence to be adduced concerning the hardship. Mrs Fay failed, despite the expense involved in the dual procedure and the relative ease with which she would be able to obtain a divorce after one more year.

The decision means that, to maximise the chances of success in future applications, considerable detail will have to be given of the behaviour of both parties without the benefit of firm guidelines on the meaning of hardship to limit it. This result serves to confirm the view of the Law Commission in its report *Time Restrictions on the Presentation of Divorce and Nullity Petitions* (Law Com no 116, 1982) that the three year bar needs to be reformed. It is regarded as unsatisfactory because it demonstrably fails to buttress marriages and because the uncertainty in the law, illustrated by *Fay*, encourages the making of unpleasant allegations, contrary to the aims of the breakdown principle underlying the general divorce law. The Law Commission proposed the replacement of the present s 3 by an absolute bar on divorce petitions during the first year of marriage. Such reform might be undertaken even more profitably in conjunction with a consideration of divorce law and grounds generally.

Court v Court [1982] 2 All ER 531, Fam D, and *Savage v Savage* [1982] 3 All ER 49, Fam D, related to applications by wives for leave to make absolute out of time decrees nisi of divorce and the question for determination was whether the court should exercise its discretion under the proviso to r 65(2) of the Matrimonial Causes Rules 1977 to make the decree absolute notwithstanding that more than twelve months had elapsed since the decree nisi. In *Court* the wife petitioner resumed cohabitation with her husband through force of circumstances which, as the court later held, was reasonable, and remained with him for more than six months. Her application was granted by Arnold P, who stressed the importance of evidence, oral or by affidavit, accounting for the delay in applying to have the decree made absolute and also that these cases should be heard in open court. Delay required the court

to consider afresh the factors relating to children in s 41 of the Matrimonial Causes Act and also whether six weeks should elapse before the decree absolute took effect, by analogy with the usual gap between decree nisi and absolute. No further delay was considered necessary in this case and the decree was made absolute forthwith.

Court was considered in *Savage*, where the spouses had attempted reconciliation and lived together for over three years after decree nisi. By the time of application five years had elapsed since the grant and, given the chance of failure inherent in such an application, Wood J recommended consideration of the alternative of application for leave to file a second petition to be brought on for hearing at the same time as the application for leave to make the decree absolute (at 53 e). Wood J also noted the likelihood that Special Procedure would exacerbate the problem of ensuring that sound evidence underlay the grant of the original decree nisi, there being an increasing number of cases involving resumed cohabitation after decree nisi. On the facts of this case it could not be said that the wife could not have been reasonably expected to live with the husband. The importance of the possibility of reconciliation even after decree nisi was considered and to this end it was suggested that the law should be altered so that a decree nisi should lapse after a given period, possibly two years.

These cases point to the necessity for advisers to ensure either that the decree absolute is applied for in good time or that the parties have truly reconciled or that a fresh petition is prepared where the delay is considerable.

6 Financial relief

Major reconsideration of the fundamental principles of assessment of lump sums occurred in *Preston v Preston* [1982] 1 All ER 41, CA, and in *Potter v Potter* [1982] 3 All ER 321, CA. The so-called one-third rule has enjoyed a revival since its approval by Lord Denning MR in *Wachtel v Wachtel* and, whatever its shortcomings as an appropriate fraction, it has been relied on extensively by practitioners as a guideline and a starting point for negotiations. Nevertheless, the strict legislative requirement is to apply to each claim for financial relief the carefully designed factors listed in s 25(1) of the Matrimonial Causes Act. In *Preston* the former wife was awarded what is believed to be the highest ever reported lump sum, £600,000 plus her former husband's share in the matrimonial home valued at £100,000, from the husband's assets of £2.3 million. Although the assets of the family were in the event divided approximately as to two-thirds to the husband and one-third to the wife, Ormrod LJ described it as wrong in principle to adopt a purely arithmetical approach in considering allocations of assets (at 47 e); nothing was said directly about periodical payments for, by consent, the wife's application for periodical payments for herself was dismissed and maintenance for the youngest child was included in the lump sum. This was a new departure in child support, criticised by Brandon LJ alone, for s 23(4) of the Matrimonial Causes Act gives a child an inalienable right to periodical payments, the husband wished to make them and, by including the son's upkeep in the wife's lump sum, the amount to be spent on him was left entirely to the wife's discretion and potential tax relief was wasted. It would however be possible for the wife to apply for periodical payments for the son in the future if this became necessary.

The 'clean break' approach was favoured by all three members of the court in relation to the wife's rights, because the parties were agreed on it and the available resources were sufficient to meet any future requirements.

The husband's appeal was grounded largely on his contention that £600,000 was too large a sum to be justified by any standards. Although no member of the court would have awarded so large an amount at first instance neither Ormrod LJ nor Hollings J considered that its size rendered the trial judge's decision plainly wrong: there might be a 'ceiling' on amounts required to satisfy financial provision for a wife under s 25 but that upper limit had not yet been reached. Ormrod LJ considered each factor in s 25(1) in connection with the circumstances of the husband and wife and, in determining her requirements and meeting the conditions of the proviso to s 25(1) was considerably influenced by the post-divorce standard of living enjoyed by the husband and his new wife. He concluded that Mrs Preston could reasonably expect to live in a house costing £200,000 to £300,000, to have a second home in the country or abroad and a very high spending power, standards that can hardly be said to be reasonable or attainable in respect of any other reported claim. It was admitted that it is rare for a court to be able to consider the full extent of its powers under s 25(1) for in most cases the slender resources available to the parties or the impracticality of realising them imposed constraints:

> 'it is only in the rare case where the assets are very large and there is no serious liquidity problem that it becomes necessary to consider the ultimate limits of the court's discretionary powers under this section' (per Ormrod LJ at p 47).

The precedents relied on most extensively were those relating to very wealthy couples (*O'Donnell v O'Donnell* [1975] 2 All ER 993, CA; *S v S* (1980) 10 Fam Law 240, CA; *Page v Page* (1981) 11 Fam Law 149, CA) and it would probably be correct to confine the reasoning in *Preston* to that small category and to accept that different principles govern the determination of the claims of spouses of more modest means. The award of the lump sum in *Preston* was said not to be calculated with regard to the income it would produce nor to enable the wife to leave it to others on her death. The decision of the trial judge to award costs on a common fund basis was upheld: RSC Ord 62 r 28(3) gives the court an unfettered discretion so to do, provided that there are special or unusual features in the case justifying the departure from the norm of party and party basis. The trial judge's order that interest be paid on instalments of the lump sum was set aside however, since there is no power in s 23 of the Act to require this before the instalments become due for payment under the order.

The applicability of the one-third rule to a division of assets was again denied in *Potter*, but preserved as a useful rule of thumb 'in straightforward cases of applications for periodical payments where the incomes of the parties are readily ascertainable' (at 324 d). The calculation, it was said, should be determined by balancing the wife's reasonable requirements against the husband's ability to pay, bearing in mind the need to preserve his business. This resulted in a lump sum of £10,000 rather than the £23,900 calculated by the trial judge on the basis of the one-third rule. The marriage of the Potters had been short and childless and the wife was earning but, again, regard to the standard of living factor dictated a lump sum in addition to transfer of the

husband's share in the former matrimonial home, which might otherwise have sufficed as relief (per Ormrod LJ at 327 a). The circumstances in *Potter* might in fact have produced a similarly reduced amount even without the rejection of the one-third rule.

This disparagement of the one-third rule coupled with a limitation of the full ambit of s 25(1) to very wealthy cases must cast doubt on the utility of s 25(1) generally and leave practitioners in some doubt as to how best to advise clients. The Law Commission has recommended repeal of the proviso to s 25(1) and refinement of its objectives (*The Financial Consequences of Divorce: The response to the Law Commission's Discussion Paper, and recommendations on the policy of the law*, Law Com no 112, 1981).

In *Emanuel v Emanuel* [1982] 2 All ER 342, Fam D, the Anton Piller procedure was applied for the first time in family law to enable a wife to search the premises of the husband. Following the judgment in *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 All ER 779, CA, in exceptional cases an order may be made on an ex parte application enabling the plaintiff to enter the defendant's premises to inspect and remove material where it is essential that the plaintiff should have inspection and where there is clear evidence that the defendant, if forewarned, may destroy the material thereby causing serious damage to the plaintiff. After long drawn out ancillary relief proceedings Mr Emanuel had sold property, the subject of a claim by his wife, in defiance of court orders and in breach of undertaking and had spent the proceeds. Wood J, while emphasising the exceptional nature of such orders, granted the wife's application in respect not only of documents relating to the husband's assets but also those relating to sale of property to the second respondent, his sister. Notably, the order extended to encompass third parties' property and also to documents providing evidence of a wrong as well as those that were subject matter of the dispute and the implications of this for a second wife whose husband is resisting a claim by his first wife are considerable. Moreover the order was made despite the risk that taxation offences or perjury might be uncovered and the court did not allow the privilege against self-incrimination to be invoked in the husband's favour.

This use of the Anton Piller order certainly represents a new departure and a questionable one. The order was developed originally in relation to commercial interests and its extension in *Emanuel* is not obviously appropriate or even necessary, given that the courts have experience of making financial orders against recalcitrant husbands by drawing adverse inferences from failure to disclose (*Brett v Brett* [1969] 1 All ER 1007, CA; *Weisz v Weisz* (1975) 126 NLJ 90, CA). In fact maintenance orders had been made on the basis of the existing evidence in *Emanuel* and the Anton Piller justification of serious damage was absent. The risk of infringement of liberty, so carefully guarded against in criminal law, is real also in family law.

In *Bonning v Dodsley* [1982] 1 All ER 612, CA, the 10-year marriage of Mr and Mrs Bonning had been dissolved in 1964, without financial provision for the wife. She married Mr Dodsley in 1966 and remained married to him throughout. Mr Bonning having become wealthy and Mrs Dodsley being badly off, she applied for ancillary relief. The appeal concerned Mr Bonning's summons to strike out the application for, inter alia, want of jurisdiction: s 7(4) of the Matrimonial Proceedings and Property Act 1970 prohibited a divorced person who had remarried from applying for financial

relief in respect of the dissolved marriage (see now s 28(3) of the Matrimonial Causes Act 1973). Ormrod and Fox LJJ held that the section did not apply retrospectively so as to establish a bar by virtue of remarriage before the date on which it came into force, 1 January 1971. This conclusion was based on the general principle in *Madden v Madden* [1974] 1 All ER 673, Fam D, against retrospectivity, despite specific financial relief precedents in favour of retrospective application of the 1970 Act in *Williams v Williams* [1971] 2 All ER 764, PDA and *Powys v Powys* [1971] 3 All ER 116, PDA. The surprising result is that, contrary to the philosophy of the present law, a wife who remarried before 1971 may apply for financial relief from a husband from whom she parted many years before and who could not have expected that such a claim would ever be made.

A more stringent attitude towards financial provision was taken in *Tommey v Tommey* [1982] 3 All ER 385, Fam D, where Balcombe J held that, since it was the policy of the law to encourage a clean break after divorce a consent order could not be impeached after decree absolute on the ground of undue influence. This finding does not affect the ability of a party to resile from a mere agreement made as a result of undue influence (*Backhouse v Backhouse* [1978] 1 All ER 1158, Fam D) nor the ability of the court to set aside an order for fraud. The court's powers to deal with this latter situation and the advantages of bringing a fresh action before a judge at first instance over proceedings by way of appeal were reviewed by Ormrod LJ in *Robinson v Robinson (Note)* [1982] 2 All ER 699, CA.

7 Divorce and the matrimonial home

The inequalities inherent in any attempt to allocate the benefits of a modest matrimonial home between two parties in need of housing or capital are becoming ever more apparent while the very aims of the s 24 jurisdiction remain obscure. The *Mesher* ([1980] 1 All ER 126, CA) solution of trust for sale with postponement was popular throughout the 1970s as a method of housing a mother without depriving the husband of the whole of his investment in the home. The Court of Appeal has now been confronted by the difficulties ultimately caused to the wife beneficiary of such an order, and the result is that this device has been roundly condemned. In *Harvey v Harvey* [1982] 1 All ER 693, CA, supra, Ormrod LJ described the effect of a *Mesher* order as simply to postpone the evil day and to avoid facing the facts at the time of the dispute (at 698 a). The wife succeeded in her appeal against the *Mesher* order made by the trial judge and for this there was substituted one foreshadowed by the decision in *Dennis v McDonald* [1981] 2 All ER 632, Fam D, supra. Sale was postponed until the wife died, remarried, voluntarily left the home or became dependent upon another man and it was directed that from the date of repayment of the mortgage or on which the youngest child reached eighteen, whichever was the later, she was to pay an occupation rent to the husband. This new type of order has many of the drawbacks appertaining to a *Mesher* order: if the wife ever wished to move house for whatever reason the husband's one-third share of the proceeds and the Legal Aid debt, if any, would become payable and, if the wife became dependent on another man then, regardless of the interests of the children, the house would have to be sold. The husband is deprived of his share of the capital indefinitely and in

Harvey he had had to be rehoused by the council. This situation was justified by reference to the proviso to s 25(1) which, according to Purchas J, meant that had the marriage continued neither party would have realised the asset represented by the home so that the husband could not expect an immediate share of the proceeds. This approach to the implementation of the (now discredited) proviso could equally well have led to the conclusion that either party should be totally deprived of capital or that the wife should be content to be rehoused by the council. The one proposal that would have achieved equality of treatment, namely, a division of the proceeds and council accommodation for each, was rejected with disapprobation (at 697 a). It is certainly not likely to have been the case, had the Harveys remained married, that the husband alone would have been relegated to council housing and deprived of the availability of capital that would have given him mobility. The occupation rent payable by the wife in a few years' time would never amount to the equivalent and, moreover, her ability to pay even this sum must be doubted as must the utility of this device in most cases, given the general assumption that an older wife will be in permanent need of maintenance from the husband and not vice versa.

A further difficulty in dividing home and proceeds was revealed in *Re Abbott (a bankrupt) ex p the trustee of the property of the bankrupt v Abbott* [1982] 3 All ER 181, ChD. By a consent order following divorce the matrimonial home was sold and the proceeds divided. Unknown to the wife the husband was insolvent at that date and two years later his trustee in bankruptcy sought the return of a part of the proceeds as a 'settlement' on the wife, void against the trustee under s 42 of the Bankruptcy Act 1914. The issue was whether the wife was a purchaser for valuable consideration within the meaning of s 42 such that the settlement would remain valid, it being agreed that the consent order was a settlement. The compromise of Mrs Abbott's claims under s 24 of the Matrimonial Causes Act 1973 at the date of the divorce was held to render her a purchaser for valuable consideration within the Bankruptcy Act, although this would not necessarily be equally true of all beneficiaries of consent orders on divorce. With this should be contrasted the less fortunate position of the wife in *Re Holliday* [1980] 3 All ER 385, CA, supra, whose husband was adjudicated bankrupt before the hearing of her claims under s 24 and in addition the pecuniary attitude to the contribution made by the wife of the bankrupt in *Re Densham (a bankrupt) ex p the trustee of the bankrupt v Densham and another* [1975] 3 All ER 726, ChD.

It may be that these things are better ordered in New Zealand where the Matrimonial Property Act 1976 provides on divorce for an equal division of matrimonial property unless the contribution of one spouse to the marriage partnership has clearly been greater than that of the other. The problem in *Reid v Reid* [1982] 3 All ER 328, PC, was whether the proceeds of sale of the husband's business, started before marriage but sold during it, were matrimonial property, defined as 'all property acquired by either the husband or the wife after the marriage' or separate property, not within the definition and not subject to division. As a matter of construction of the statute the proceeds of the business were held to be matrimonial property and the Privy Council refused to disturb the apportionment made by the local court in its discretion of 60% to the husband and 40% to the wife. The decision accords with the probable intent of the 1976 Act to divide increases in separate

property due to collaborative effort. The New Zealand legislation may be difficult to interpret but its aims of limiting the extent of property to be shared on divorce and of equal division are perhaps worthy of emulation.

8 Affiliation

In *R v Hereford City Justices, ex p O* [1982] 3 All ER 568, QBD, a mother wished to appeal against an order made by magistrates under the Affiliation Proceedings Act 1957 on the ground that the amount ordered, £1 per week, was too small. The question reported was whether an appeal in regard to quantum lay to the Crown Court under s 8(1) of the Act or to the Divisional Court by way of case stated. Appeal to the Crown Court was held to be the correct procedure and *R v Ipswich Crown Court, ex p Smith* (1973) 143 JP 586, DC, was not followed. Such difficulties would be obviated by a rationalisation of the family law jurisdiction in a family court setting and alternative methods of achieving this have recently been put forward.

9 Custody

In *D v M (minor: custody appeal)* [1982] 3 All ER 897, CA, an unmarried mother appealed to the Divisional Court against an award of custody to the father by magistrates under the Guardianship of Minors Act 1971 and then, after dismissal of her appeal, she came before the Court of Appeal. Ormrod LJ held, on the procedural issue, that the Divisional Court had been wrong in the way it had restricted its reconsideration of the decision made by the magistrates. There has been a long standing division of opinion in the Court of Appeal concerning the powers of an appellate court in custody cases: on the one hand it has been said that there should be no interference with the exercise of the discretion of the court of first instance unless that decision was one which no reasonable court could have reached or was wrong in law (*Re F (a minor) (wardship: appeal)* [1976] 1 All ER 417, CA, per Stamp LJ at 429, confirmed by *B v W and others (wardship: appeal)* [1979] 3 All ER 83, HL), and on the other it has been held that it is the duty of the court to review the way in which the lower court balanced the factors relevant to custody determinations and to correct it if that court has erred (*Re O (infants)* [1971] 2 All ER 744, CA, per Davies LJ at 748; *Re F*, supra, per Bridge LJ at 439). Without reference to *B v W*, the latter view was preferred by Ormrod LJ in *D v M* in such terms as to leave an appellate court almost completely free to review any custody determination. This freedom adds to the uncertainty but, if the child's welfare is paramount, then it cannot be right that a court should artificially restrict its review of decisions affecting the child.

On the substantive issue the mother's appeal was allowed on consideration of two matters which are generally treated with far greater importance today than they were twenty years ago, namely, the danger of disturbing a small child's continuity of care (at 903 a–c), and the likelihood of preservation of good relations with the non-custodial parent (at 903 d).

A welcome indication of increased awareness of the ill effects on a child of contested custody is the *Practice Direction* [1982] 3 All ER 988 providing for an experimental scheme of conciliation in such cases, to be operated by the Principal Registry of the Family Division and involving conciliation appointments before registrars attended by court welfare officers.

10 Child care

The fragmented nature of the child care legislation and the delayed implementation of the Children Act 1975 have made their effects further felt. *W v Nottinghamshire County Council* [1982] 1 All ER 1, CA, concerned a child who was received into care at birth under s 1(1) of the Children Act 1948 (now s 2(1) of the Child Care Act 1980) and in respect of whom the local authority passed a resolution two years later under s 2(1)(*b*)(v) of the 1948 Act (failure to discharge parental obligations: see now s 3(1)(*b*)(v) of the 1980 Act) vesting in them the parental rights and duties. After a further year's delay and adjournment the juvenile court eventually ruled that there was indeed evidence that the mother had failed to discharge her parental obligations. On appeal by her, the local authority contended in the alternative that at the relevant time the child had been in their care throughout the preceding three years so that the ground of three years' care provided for in s 2(1)(*d*) of the 1948 Act (now s 3(1)(*d*) of the 1980 Act) was made out. In the Court of Appeal it was held immaterial that the original ground for passing a s 2 resolution might have ceased to exist by the time a hearing took place before the juvenile court (the mother denying the continuation of her earlier failure to discharge parental obligations) as long as another ground in s 2(1) could be established at the hearing. The court drew attention to the difficulties that can ensue from adjournment of proceedings under s 2(5) of the 1948 Act (now s 3(5), (6) of the 1980 Act), as had occurred.

The second issue was whether the child had spent three years in 'care' of the nature required by s 2(1)(*d*), since initially he had been received into care voluntarily under s 1 and had subsequently become subject to a s 2(1) resolution during the relevant three-year period. The mother contended that the result of assumption of parental rights under s 2 was different in nature to the voluntary care existing under s 1. On this point Ormrod LJ opined that 'care' was one concept, whether resting on s 1 or s 2, the difference between the two situations being only that s 2 removes the right of a parent to have the child returned.

This latter finding may be hard to sustain if argued in a case where the merits were less clear than in *W*. The parental rights and duties assumed under s 2 of the 1948 Act (s 3 of the 1980 Act) have been defined by s 85(1) of the Children Act 1975 (applied to later statutes by the Interpretation Act 1978, Sch 1) and s 3(10) of the Child Care Act 1980 (s 3 of the 1948 Act). Although there is dispute as to the precise effect of such resolutions there is no doubt that they are a serious matter (*Wheatley v London Borough of Waltham Forest* [1979] 2 All ER 289, Fam D, per Waterhouse J at 294) and do give the local authority something substantially different from the duties assumed under s 1 of the 1948 Act (ss 2(3) and 4 of the 1980 Act elaborate). There is widespread dissatisfaction with the procedures for passing and operating these resolutions. The Child Care Bill 1982 (19 H C Official Report (6th series) cols 866–870) would have replaced s 3 of the 1980 Act (s 2 of the 1948 Act) by a new procedure, whereby the local authority would have to initiate juvenile court proceedings in every case.

Where parents wished to appeal on a child's behalf against a care order made under s 1 of the Children and Young Persons Act 1969, they were held entitled to do so despite the fact that the child had been independently

represented before the juvenile court and counsel for the child had not opposed the making of the order (*Southwark London Borough Council v C (a minor) C (minors) v Martin* [1982] 2 All ER 636, Fam D). Arnold P expressed surprise that s 64 of the Children Act 1975, which will provide for the appointment of a guardian ad litem in case of conflict of interest between parent and child, was not in force: it would obviate the problem.

Another aspect of expenditure of public money was evident in *Re G (a minor) (wardship: costs)* [1982] 2 All ER 32, CA, where the Official Solicitor had been appointed guardian ad litem of a minor in care in wardship proceedings. Guidance was given by Ormrod LJ concerning the payment of the Official Solicitor's costs in relation to the request for his appointment. The trial judge had ordered the local authority to pay one-half the Official Solicitor's costs and this order was upheld but the hope was expressed that when public bodies are involved they will be able to agree between themselves how to deal with these costs (at 36 g).

11 Adoption

The rare occasions calling for the appointment of the Official Solicitor as guardian ad litem were outlined in *Re F (a minor) (adoption: parental consent)* [1982] 1 All ER 321, CA, and confirmed by a *Practice Direction* [1982] 1 All ER 319. The case concerned an appeal by foster parents against refusal of their application to adopt. The mother's consent was dispensed with under s 12(1)(*b*)(ii) of the Children Act 1975. She had withheld it solely in order to secure her right of access and not in order to resume care of the child. The decision to dispense was held to be governed not by statute but by the principle of *Re W (an infant)* [1971] 2 All ER 49, HL:

> 'The objective test to be applied is whether the natural parent, in withholding her agreement to the adoption, is being reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case' (p 334 g).

In deciding whether to make the order in favour of the foster parent applicants, s 3 of the Children Act required that the child's welfare be the first consideration and this was translated into the need to have regard to the increased security and freedom from dependence on social workers which only an adoption order, not care and control, could give.

Further elucidation of the meaning of s 3 of the 1975 Act was given in *Re H (a minor) (adoption: non-patrial)* [1982] 3 All ER 84, Fam D. Adoption proceedings were launched by UK naturalized citizens in respect of a nephew from Pakistan who had failed to secure leave to stay in the UK under immigration provisions. The court had to balance the welfare of the minor against the possibility of abuse of adoption proceedings as a means of obtaining British nationality. In this case the child had been genuinely rejected by his parents in Pakistan and the main motive of the adoption application was held to be not the securing of British nationality but the real emotional, social and legal benefits of adoption. The order was made, despite the fact that the child was close to the age of majority and that it entailed the overriding of immigration procedures.

These cases are illustrative of the use commonly made of adoption law in situations far removed from those for which it was originally intended. Adverse comments on the failure to bring into effect s 33 (custodianship) of the Children Act 1975 were made by Ormrod LJ in *Re F*, supra. The concept of custodianship was designed as an alternative to adoption by foster parents and relatives and to provide them with the security lacking in other existing arrangements and, had s 33 been in force, adoption might well not have been the outcome in these last two cases.

Land Law

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1 'Land'

Three cases concern the question of what amounts to land, and matters connected therewith. *Southern Centre of Theosophy Inc v State of South Australia* [1982] 1 All ER 283 examined the doctrine of accretion. The Privy Council throughout assumed that English law and South Australian law were identical and in a scholarly opinion given by Lord Wilberforce, held that the doctrine applied to non-tidal lakes, following American authority, but contrary to *Trafford v Thrower* (1929) 45 TLR 502, a decision of Eve J; the doctrine also applied to Crown land. Accretion and, by analogy, erosion and diluvion, were doctrines of the common law and could be adjusted and expanded; it had already been accepted that changes caused by human action could be within the doctrine (in *Brighton and Hove General Gas Co v Hove Bungalows Ltd* [1924] 1 Ch 371 the effect of groynes erected by a third party for harbour protection was held to amount to accretion) and, in similar fashion, accretion by windswept sand as distinct from fluvial action, was within the scope of the law. The accretion had to be imperceptible, though the reason or reasons for this are unclear: see [1982] 1 All ER at 291, and imperceptibility was a jury question. Their Lordships were somewhat uneasy as to the evidence before them, but, on the basis that the evidence took the form 'I would expect that' rather than 'I saw and measured', the Board upheld the decision of the trial judge that accretion had occurred.

Earl of Lonsdale v A-G [1982] 3 All ER 579 discusses the construction of the phrases 'mines and minerals' and 'mineral substances' contained in a conveyance of 1880. The case was complicated by a definition of 'mineral substances' in an earlier document of 1860, but Slade J considered the general issue at length. The Earl argued that the grant (which was for an area which extended, in part, beyond the three-mile limit, below the sea bed off the Cumbrian coast) included rights to oil and gas; the Crown resisted this contention, partly on the grounds that the rights to oil and gas had never been transferred to the Earl, but also on the basis that, even if the rights had been transferred, they had later, by Statute, revested in the Crown. After a very full review of the authorities ([1982] 3 All ER at 596–609), Slade J summarised his conclusions at [1982] 3 All ER 609–610. It was important to consider what the phrases used in the document meant at the time the document was executed, in the vernacular of 'the mining world, the commercial world and landowners.' On the evidence or, alternatively, by operation of the principle applicable to grants by the Crown that the words must be construed in the manner most favourable to the grantor, only solid substances were included; the rights to oil and gas did not, therefore, pass. Although unnecessary for his decision, Slade J considered the effect of the Petroleum (Production) Act 1934 and the Continental Shelf Act 1964; the latter Act revested in the Crown any rights to oil or natural gas outside territorial waters that had hitherto been the subject of a Crown grant.

The third case and the one that holds the most general interest this year, as distinct from interest to practitioners and academics, must be *Attorney General of the Duchy of Lancaster v G E Overton (Farms) Ltd* [1982] 1 All ER 524. The Court of Appeal considered the history and definition of treasure trove though, perhaps, without sufficiently full consideration of the Roman law on the point. In the result, they preferred the definition laid down by Coke to those of Bracton and Blackstone, ie that for an object to be treasure trove, it must be substantially of gold or silver. The objects in question were a hoard of Roman coins, antoniniani, which, though regarded by the Romans as silver currency, were debased; most of the coins had about 1% of silver, and no coin had more than 18%. The fact that those who minted and issued the coins regarded them as silver did not matter; what was required that there had to be a substantial amount of silver. 'Substantial', according to Lord Denning MR, meant 50% or more; Dunn LJ, however, thought that it would be for the coroner's jury, considering the evidence, and using their common sense, to decide whether the test was satisfied. Oliver LJ agreed with both judgments. The uncertainty of Dunn LJ's view may well lead to difficulties, and to similar items being treated differently by individual juries. Lord Denning MR expressed the hope that Parliament would redefine treasure trove, because the requirement of the presence of a substantial amount of precious metals meant that many priceless objects such as bronze Celtic metalwork, or iron artefacts, could be lost to the national heritage. An attempt, however, to amend the definition by a private member's Bill, failed.

2 Registered land

One of the professed advantages of the system of registration of title under the Land Registration Acts is that a purchaser has only to look at the Register to know what the state of the title is, subject always to the existence of overriding interests and to the possibility of rectification. Trusts, according to the Land Registration Act 1925 s 74 (at any rate before *Williams & Glyn's Bank Ltd v Boland* [1980] 2 All ER 408) were kept off the title. Even this, however, was not totally true, even if only because of the much criticised decision of Graham J in *Peffer v Rigg* [1978] 3 All ER 745, where an ex-wife, who purchased a house from her husband with actual knowledge that he held it on trust for himself and another, was bound by the trust; she was not a bona fide transferee under LRA s 20(1) and she was also a constructive trustee.

The issue in *Lyus v Prowsa Developments Ltd* [1982] 2 All ER 953 (D Jackson, [1983] Conv 64, D J Hayton (1983) 133 NLJ 188, G Harpum [1983] CLJ 54, P H Kenny (1983) 46 MLR 96) was simple. The plaintiffs had contracted with a firm of builders that the latter would build them a house. The builders, who had already mortgaged the land (which was registered) to a bank, who in the exercise of its statutory powers, sold the land to the defendants, subject to the benefit and burden of the original contract. The defendants then refused to perform the contract to build a house for the plaintiffs. It was agreed on all sides that the defendants knew of the contract, but that the only relevant entry on the register, a caution, was subject to the previously entered mortgage under which the bank had properly exercised its power of sale. If the bank had agreed, there could have been registration

which gave priority over the bank, but this was never sought. It could also be argued that the caution should not have been warned off, but should have been retained on the register: see Land Registration Rules 1925, rr 219, 220. The defendants relied on LRA s 20, but were defeated by Dillon J's finding that a constructive trust existed for the plaintiffs' benefit.

Several points may be made. First, the sanctity of the protection afforded to a registered purchaser has clearly been violated though, as indicated above, not for the first time. Second, the use of the constructive trust is interesting. The imposition of the constructive trust in land law as a device for the protection of third party interests, notwithstanding a statutory framework provided both in cases of registered and unregistered title, has been a post-war development. Constructive trusts were considered in *Bannister v Bannister* [1948] 2 All ER 137, but their main developments has occurred in the last 15 years. Lord Denning MR relied on the concept in *Binions v Evans* [1972] 2 All ER 70, where a contractual licence was protected by means of a constructive trust (though the other members of the court did not advert to the question) and this reasoning was followed by Lord Denning MR and Goff LJ in *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 3 All ER 462. Further, in *Hussey v Palmer* [1972] 3 All ER 744, a constructive trust or a resulting trust (which Lord Denning MR regarded as similar) was imposed to protect what may well have been a contractual right. *Peffer v Rigg* has already been mentioned. However, doubts were cast on the ambit of the constructive trust in *Re Sharpe (a bankrupt)* [1980] 1 All ER 198.

Two questions remain to be asked. First, what is the scope of the constructive trust? Second, even if its scope is clear, were the facts of *Lyus v Prowsa Developments Ltd* a suitable arena for its operation? As indicated above, the limits of the constructive trust as used by Lord Denning MR and others is uncertain; indeed, any institution or remedy purporting to operate to prevent fraud and unconscionable behaviour must have unclear parameters. Lord Denning MR's view, in *Hussey v Palmer* [1972] 3 All ER at 747 is that the trust should be imposed 'wherever justice and good conscience require it.' Dr Hayton, in his article in (1983) 133 NLJ 188 repeats the warning contained in the judgment of the New Zealand Supreme Court in *Carly v Farrelly* [1975] 1 NZLR 356 at 367, that it is

> 'a supposed rule of equity which is not only vague in its outlook but which must disqualify itself from acceptance as a valid principle of jurisprudence by its total uncertainty of application and result... No stable system of jurisprudence could permit a litigant's claim to justice to be consigned to the formless void of individual moral opinion.'

To quote Sir John Donaldson MR in a different context, there appears to be a portable palm-tree. However, as Hayton argues in *Registered Land* (3rd edn) p 20, there may still be a limited action in personam whenever there is fraud in the equitable sense. Indeed in land law, any doctrine that is flexible and, to that extent uncertain, should be used with extreme caution because of the vital requirement of certainty of property rights; the wider the doctrine, the greater the need for caution.

The working of, and philosophy behind, the Land Charges Act 1972, considered by Lord Wilberforce in *Midland Bank Trust Ltd v Green (No 2)* [1981] 1 All ER 153, was encapsulated in the statement ([1981] 1 All ER at

159) that it is not fraud to rely on legal rights conferred by Act of Parliament. The defendants in *Lyus v Prowsa Developments Ltd* relied on this, coupled with LRA s 20, but were met with the judicial riposte that the fraud was not in relying on the legal rights conferred by statute, but in the first defendant's reneging on a positive stipulation in favour of the plaintiffs in the bargain under which the first defendant acquired the land ([1982] 2 All ER at 962 d–e). This, however, begs the question. If that stipulation could have been properly entered on the Register, then it could be argued that we are back again to Lord Wilberforce's statement. A purchaser *does* have a recognised right to take free of unregistered, non-overriding interests. Unless, as Harpum argues ([1983] CLJ 54), there was a possibility of rectification to give effect to an improperly removed caution, the case seems simple: or at least one assumes Lord Wilberforce would have found it so. Dillon J was clearly prepared to investigate the knowledge of the parties in a way that Lord Wilberforce in *Midland Bank Trust Ltd v Green* regarded as unsatisfactory, if not impossible.

Dillon J seems to have regarded the constructive trust as necessary for the protection of the parties to the original agreement. Two points may be made on this: first, this tends to confuse property and contract (cf *Hurst v Picture Theatres Ltd* [1915] 1 KB 1), as unsupported contractual rights do not bind third parties, whereas property rights are capable of doing so. With the utmost respect to Dillon J, it is not necessarily 'a strange result . . . that purchasers can override the defendants rights and leave the vendors liable in damages to the defendants'. This is, after all, what might happen if there were an unregistered restrictive covenant. A statutory mechanism is provided for protection of rights if they are to run with the land; if that is not used, why should the law be astute to find other methods when, in theory and often in practice, a remedy is available under an established rule of law? On the facts of *Lyus v Prowsa Developments Ltd*, the remedy of damages was presumably worthless because of the defendants' bankruptcy, though there was a claim, in respect of the deposit, against the NHBC.

According to Dillon J, the fact that the defendant in *Binions v Evans* was in occupation before sale, whereas the plaintiffs in *Lyus v Prowsa Developments Ltd* were not, is irrelevant. This may be so on the facts, but if (as it appears from *Binions v Evans* is the case) a constructive trust is, or creates, an interest in land, which can ensure through different ownerships of property, a constructive trust plus actual occupation could amount to an overriding interest within LRA s 70(1)(g). The problems involved in the operation of the proviso to the paragraph can be imagined.

The attitude of the court towards the statute and to the scheme of the legislation is interesting. Judges from at least the seventeenth century and later have regularly used the maxim that 'Equity will not allow a statute to be used as an instrument of fraud' but the fact that judges of former generations have adopted a cavalier attitude towards old, often imperfectly drafted, legislation does not—or should not—give a court in 1982 infinite powers to avoid a statutory result that it does not like. The fact that *Rochefoucauld v Boustead* [1897] 1 Ch 196 adopted a broad view towards the avoidance of the Statute of Frauds does not mean that such a view should be adopted towards the avoidance of the Land Registration Act. In *Lyus v Prowsa Developments Ltd*, as in *Peffer v Rigg*, major parts of the Land Registration Act were left unexplored: s 74, which provides that a person dealing with a registered

estate shall not be affected with notice of a trust, express, implied or constructive, and s 59, dealing with the protection of interests, were not considered, though the broad approach that Dillon J adopted to s 20 would presumably have applied to them as well. But what is the point of a system of registration that can be ignored? The cavalier attitude of Dillon J towards the Land Registration Acts can be contrasted with the literal approach adopted by the Court of Appeal to the statutory provisions giving the court discretion to protect mortgagors of dwelling houses from possession orders: see *Habib Bank Ltd v Tailor* [1982] 3 All ER 561.

Three minor points of interest are also to be found in the judgment in *Lyus v Prowsa Developments Ltd*. First, an argument on LPA s 56(1) failed, the judge relying on the view of Simonds J in *White v Bijou Mansions* [1937] 3 All ER 269 as to the ambit of the section, though neither the slightly different view of Sir Wilfred Greene MR in the Court of Appeal in that case ([1938] 1 All ER 546) nor the decision of the House of Lords in *Beswick v Beswick* [1967] 2 All ER 1197 was, it appears, considered. (*Beswick* is included in the extract from *Binions v Evans* cited by Dillon J, but is not discussed in the context of s 56.) Second, a brief, but approving, reference is made to the doctrine in *Halsall v Brizell* [1957] 1 All ER 371. With the exception of the exhaustive analysis by Sir Robert Megarry V-C in *Tito v Waddell (No 2)* [1977] 3 All ER 129 at 277–297, it seems the fate of this doctrine to be referred to by inference and innuendo, rather than to be the basis for decisions. Third, it is emphasised that want of mutuality is not a bar to specific performance, though, as Jackson, supra, points out, Dillon J is confusing two meanings of mutuality: first, is there a remedy of specific performance when a contract is admitted to exist, or, alternatively, is there a mutually binding contract at all?

3 Contracts for the sale of land

No year seems to pass without at least one case on LPA s 40. This year's offerings come from the Privy Council (dealing with the Barbados Statute of Frauds, equivalent, in all material respects, to s 40) and from the English Court of Appeal. *Elias v George Sahely & Co (Barbados) Ltd* [1982] 3 All ER 801 says little that is new. The main point that would have been of interest was whether payment of money could amount to a sufficient act of part performance (see *Steadman v Steadman* [1974] 2 All ER 977, and *Cohen v Nessdale* [1981] 3 All ER 118. (This was the decision of Kilner Brown J at first instance. The point was not considered by the Court of Appeal [1982] 2 All ER 97, see below). As this issue had not been raised in the Barbados courts, however, the Privy Council did not consider it. The rest of the opinion is concerned with the reassertion of the orthodox point that a contract for the sale of land in unenforceable, not void, if not evidenced in writing, and in confirming the broad view of joinder of documents stated in *Timmins v Moreland Street Property Co Ltd* [1957] 3 All ER 265; if the document signed by the party to be charged referred to another document, either expressly or by implication, parol evidence was admissible to identify the document, and the two could be read together.

In *Cohen v Nessdale Ltd* [1982] 2 All ER 97, the Court of Appeal had to consider the vexed question whether there was an agreement when negotiations had been 'subject to contract'. There had been negotiations between the plaintiff, a tenant, and the defendants, his landlords, for the sale and purchase

of a long lease of the property the plaintiff was occupying as a statutory tenant. Negotiations, clearly subject to contract, broke down because the plaintiff thought the defendants had behaved badly by attempting to raise his rent during the negotiations for a grant of a long lease. Six months later, and after the plaintiff had on several occasions written to the defendants' agents (who were dealing with the management of the property, not its sale, and thus had nothing to do with the matter) to encourage the negotiations to continue, the plaintiff met a director of the defendants and an oral agreement was made for the granting of a long lease—or so the plaintiff believed. The defendants refused to honour the bargain, claiming that the oral 'agreement' had been like the previous negotiations, 'subject to contract'. The plaintiff, however, claimed that the 'subject to contract' element had been expunged. The Court of Appeal, though considering that the defendants had behaved badly, found in the defendants' favour. It is clear from the authorities (*Tevanan v Norman Brett (Builders) Ltd* (1972) 223 EG 1945 and *Sherbrooke v Dipple* (1980) 41 P & CR 173) that unless there was an agreement, either express or implied, that the qualification 'subject to contract' had been removed, it continued to affect the negotiations. On the facts, the evidence suggested that this agreement was not present. There are, however, indications that the Court of Appeal was influenced by the fact that the plaintiff, who described himself as 'a consultant in commerce and the law' was, like the defendants, experienced in business; this seems to have been considered relevant as it explained the care with which he, like the defendants, used the phrase 'subject to contract' in the early negotiations; it was also relevant in making it unlikely that both he and the defendants, especially the latter, had a common intention on the resumption of negotiations to conclude a binding oral contract. There is an implication that the court might have treated an inexperienced or incompetent person differently, but if the common intention is material, one party's understanding or state of mind should be irrelevant, unless the more experienced party had in some way misrepresented the position. Certainly, the case leaves the impression that LPA s 40 has been used here to abet fraud, rather than to prevent it.

4 Co-ownership

Bernard v Josephs [1982] 3 All ER 162 (JMT 98 LQR 517, Jean Warburton [1982] Conv 444, K Gray [1983] CLJ 30) involves two main issues: first, the ascertainment of shares in property held by a man and his mistress when they purchased property for their occupation in joint names, but without any declaration of trust; second, the applicability of LPA s 30 (the court's power to order a sale) when the relationship had terminated. It should be noted at the outset that the couple were engaged, even though the man at the time of the engagement and, it seems, for some time thereafter, was still married to another woman. This is presumably one of the reasons why the court was not asked to consider the case on the basis of the Law Reform (Miscellaneous Provisions) Act 1970 s 2, which provides that engaged couples are to be treated, for the purposes of the law relating to the rights of husbands and wives in relation to property, as if they were married: cf *Wilson v Carnley* [1908] 1 KB 729, *Fender v St John Mildmay* [1938] AC 1. The second reason is that it is unclear whether s 2 allows the courts to use the powers in the

Matrimonial Causes Act 1973 ss 23–25 (which are available on divorce) in the situation where an agreement to marry had been terminated. Certainly if the discretion were available, the need to apply rather rigid trust principles would disappear but, of course, the difficulty of proving the agreement to marry would remain. Shades of the action for breach of promise of marriage!

The members of the Court of Appeal differed somewhat as to their attitude to the fact that the couple were cohabiting without the benefit of clergy. Lord Denning MR ([1982] 1 All ER at 166j, 167e), treated the fact as being of little relevance, whereas Griffiths LJ ([1982] 1 All ER at 170 a–b) thought that the distinction might matter because the intentions of the parties might be different, and this view was shared by Kerr LJ ([1982] 1 All ER at 173f.) The view of the majority seems more realistic: a husband is under a common law duty to maintain his wife, whereas a man is under no such duty towards his mistress. The existence of this duty may make it easier to infer that contributions of any nature by the wife to the 'joint pocket' were intended to give her a right in the property.

The court then considered the statutory basis of the joint holding by the couple. The provisions of the LPA on co-ownership are notorious for their lack of clarity, and the situation (as in *Bernard v Josephs*) where there was a conveyance into joint names but nothing else, is not clearly covered by the legislation. Lord Denning MR stated that LPA s 36(1) meant that the property was held on trust for sale, but that proposition is difficult to reconcile with the actual words used in the sub-section, which require that the legal estate be *beneficially* limited. The courts adopted a wide view of s 36(1) in *Re Buchanan-Wollaston's Conveyance* [1936] Ch 738, but this does not appear to have been cited. Lord Denning MR's earlier use of the Settled Land Act 1925 s 36(4) in *Bull v Bull* [1955] 1 QB 234 (which may be conveniently called 'the Nelsonian approach') is well-known.

The main point was how the interests of the parties should be ascertained. Lord Denning MR ([1982] 3 All ER at 166 c–d) considered that contributions at the date of the acquisition, or later contributions in cash or in kind or in services, up to the date of the separation, were relevant. Lord Denning MR and Kerr LJ considered that, in the case of a married couple, the date of separation rather than the date of divorce, was the correct moment for ascertaining the shares of the parties, though Griffiths LJ seems to contemplate that what happens thereafter may be relevant. Lord Denning MR considered that the aim was to produce a proportion that was in the circumstances 'fair and just'. Griffiths and Kerr LJJ were more conservative, preferring to rely on the principles in *Pettitt v Pettitt* [1969] 2 All ER 385 and *Gissing v Gissing* [1970] 2 All ER 780; they were concerned to find the common intention of the parties, even though, as Griffiths LJ said ([1982] 3 All ER at 170g–h), the intentions were 'unexpressed and probably unconsidered'. The difference between these two views may be considerable. Lord Denning MR's aim, enunciated in many previous cases, is to do justice; his view is perhaps best encapsulated in *Hardwick v Johnson* [1978] 2 All ER 935 at 938f:

> 'The court has to look at all the circumstances and spell out the legal relationship. The court will pronounce in favour of a tenancy, or a licence, a loan or a gift, or a trust, according to which of these legal relationships is most fitting in the situation which has arisen; and will find the terms of that relationship according to what reason and justice require.'

The majority view is more orthodox in that it relates the terms of the trust to an alleged intention. But on orthodox principles, the intention should be found at the date of acquisition of the property: *Pettitt* and *Gissing* make it clear, however, that this intention may be inferred from later conduct. If the trust is declared at the moment of acquisition, then there are no problems; even if the court finds from all relevant evidence what at the date of acquisition the parties intended, there is at least no difficulty about the movement of the beneficial interests thereafter. The view of the Court of Appeal in *Bernard v Josephs*, however, does cause difficulties, as it assumes a change in the beneficial interests after the property has been been acquired. LPA s 53(1)(c) provides that 'a dispostion of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same . . .' Section 53(2) provides that s 53(1) does not apply to 'the creation or operation of resulting, implied or constructive trusts'. Clearly the creation of a resulting trust (at the moment of conveyance) is outside the ambit of s 53(1)(c), but unless a wide meaning is given to 'operation' then any alteration in the size of the beneficial interests must be a 'disposition'. Since in *Bernard v Josephs* the date of separation—or later—was the material date for determining the beneficial interests, the Court of Appeal must have contemplated that a 'disposition' of the equitable interests or part of it may have occurred after the conveyance to the couple. Some of the difficulties that s 53(1)(c) causes in the area of resulting trusts were considered by Lord Denning MR in *Re Vandervell's Trusts (No 2)* [1974] 3 All ER 205, but his resolution of them (which involved giving a very broad interpretation to s 53(2)) has been criticised by Harris (1975) 38 MLR 557. The answer appears to be that the flexible approach adopted, predominantly by the Court of Appeal, in the late 1960s, to do justice to wives, is still being used to do justice to mistresses (as long as they are cohabitants: *Cooke v Head* [1972] 2 All ER 38, *Eves v Eves* [1975] 3 All ER 68), or to a mother-in-law (*Hussey v Palmer* [1972] 3 All ER 748). The position of a 'kept woman' may be less secure: cf *Horrocks v Forray* [1976] 1 All ER 737. *Bernard v Josephs* does, however, indicate that there is no need for the mistress to have engaged in hard physical labour: cf *Cooke v Head, Eves v Eves*.

By comparison, the second point in *Bernard v Josephs* is straightforward. A mistress is as entitled as a wife to make application under LPA s 30 for a sale, and the 'purpose' doctrine (*Bedson v Bedson* [1965] 3 All ER 307) will be applied. This follows *Re Evers' Trust* [1980] 3 All ER 399. However, one or two useful points do emerge. First, the Court of Appeal realises that although a mistress (or, for that matter, a wife) may be entitled to a sale, a forced sale may not result in the best price being achieved, and there may be hardship on both parties to the relationship if the property is sold. However, as Purchas J pointed out in *Dennis v MacDonald* [1981] 2 All ER 632 at 640, (this point not being the subject of comment in the Court of Appeal) the court only had a discretion under LPA to make orders ancillary to sale; if no sale were ordered, no discretion existed. Ms Bernard did not demand a sale, but merely wanted her pecuniary interest in the house realised. The trial judge had held that she was entitled to a half-share in the property, and the Court of Appeal valued this at £6,000 (the reference at [1982] 3 All ER 176g to £5,000 seems an error), and gave Mr Josephs four months to raise this sum; failing that, a sale would be ordered.

One final comment: the wisdom of Bagnall J's advice in *Cowcher v Cowcher* [1972] 1 All ER 943 that express declarations of the beneficial interests in the property were sensible, was again emphasised by Griffiths LJ. Had the conveyance to the parties been more clearly drafted, litigation over title to the property would have been unnecessary.

Another aspect of co-ownership was considered in *Dennis v MacDonald* [1982] 1 All ER 590 (F Webb, 98 LQR 519, [1982] Conv 305). At first instance ([1981] 2 All ER 632) Purchas J, considering an application for sale under LPA s 30, had refused to make such an order; no appeal was made from this. As Webb points out (98 LQR 519 at 521) there are difficulties in this part of the decision, because of the problems in reconciling *Re Ever's Trust* [1980] 3 All ER 399 with *Re Holliday (a bankrupt)* [1980] 3 All ER 385; such points, however, fall outside the scope of commentary on this year's decisions. However, Purchas J ordered an occupation rent to be paid by the tenant-in-common in occupation to the tenant who had left. He based this on old authorities, and regarded the plaintiff's departure, caused by the defendant's actual or threatened violence, as equivalent to an ouster (though he regarded the breakdown in the relationship as itself sufficient to constitute an ouster: this is not easily reconcileable with the authorities). Only if there was an ouster, or if the property had been let at a rent and the profits were in dispute, could the courts order payment of money by one tenant-in-common to another. Some recent cases, however, cast doubt on this principle, though cases such as *Jones (A E) v Jones (F W)* [1977] 2 All ER 231 support it. In *Bedson v Bedson* [1965] 3 All ER 307, the Court of Appeal (Russell LJ dissenting) held that an occupation rent was payable by one co-owner to another, pending sale. Similar assumptions seem to have been made in *Leake v Bruzzi* [1974] 2 All ER 1196 and *Suttill v Graham* [1977] 3 All ER 1117. It seems that the courts have allowed an occupation rent to be payable, whether or not there is an ouster, but as a condition for delaying sale of the property: in *Harvey v Harvey* [1982] 1 All ER 693, the Court of Appeal adopted this in an application under the Matrimonial Causes Act 1973, but *Dennis v MacDonald* shows that the discretion cannot be so limited. Moreover, *Bedson v Bedson* antedates the current matrimonial legislation. Presumably an exception to the old established principles relating to the relationship of tenants-in-common inter se is in the process of evolution, though, as yet, with uncertain parameters.

A second point concerns the computation of rent. Purchas J ([1981] 2 All ER at 641h) considered that the rent for which the defendant should be liable would be half the fair rent which would be assessed by the rent officer for a letting unfurnished of the whole of the property to a protected tenant. The defendant appealed against this approach, arguing that his obligations and expenditure (he was giving a home to three of the four—or five—children of the union) were relevant; he was undertaking more and should therefore pay less. Arnold P rejected this in the Court of Appeal: the nature of the payment was some sort of compensation to be paid by the trustee to a beneficiary for an exclusive enjoyment of the trust property. It therefore followed that the purpose was irrelevant. An obvious point is that purpose is relevant in deciding whether sale should be ordered, but irrelevant here, in determining the obligations of the parties either pending sale or after refusal to grant an order to sell. A property—or trust—approach is adopted here, whereas a

more generous 'family' approach had been adopted in refusing the sale. One final point may be raised, perhaps tendentiously. If the property is held on trust, and a trustee is obtaining, as a beneficiary, advantages from the trust property, should he not be under a liability to account to his co-beneficiary for all his profits? Cases such as *Keech v Sandford* (1726) Sel Cas Ch 61 and *Boardman v Phipps* [1966] 2 All ER 721 show the harshness of duties imposed on a trustee. The courts might not wish to apply the full rigour of the principles affecting trustees to cases such as this, but the relationship, according to law, is one of trust, and whilst some powers and duties of trustees for sale are spelt out in the LPA, there is no indication that this list is conclusive.

5 'Interest in land': licences

The phrases 'an interest in land' and 'a person interested in land' have been considered in two contexts, though both involve questions of estoppel. In *Haslemere Estates v Baker* [1982] 3 All ER 525, the context was that of the Land Charges Act 1972 s 17(1), whereas in *Pennine Raceway Ltd v Kirklees Metropolitan Council* [1982] 3 All ER 628, the context was that of the Town and Country Planning Act 1971 s 164(1). In the former case Sir Robert Megarry V-C found, first, that a conditional contract (the condition being one that was to be satisfied by a third party) was registrable as a land charge; the claim, however, to register a pending land action was based on estoppel. As Sir Robert Megarry pointed out, such a claim was very easy for a developer to make, where he had spent time and money putting forward schemes, often with the landowner's encouragement. The first major issue was whether an interest based on estoppel could amount to an 'interest in land'; this will be dealt with in connection with a consideration of the *Pennine Raceway* case. The second issue is whether, even if the requirements of proprietary estoppel were made out and it could amount to an interest in land, there would, on the facts, be such an interest. The latter point was quickly resolved: although the plaintiffs would carry out the development on the property, could require leases to be granted to those who wanted an interest in the developed property, and would receive premiums on the grant of such leases, they would never themselves have an interest in the land, which at all time would remain vested in the defendants. Therefore, although they were, in lay language, interested in what happened to the land, they had no interest in it. The fact that they hoped for a charge on the land to secure a successful money claim was irrelevant.

In *Pennine Raceway Ltd v Kirklees Metropolitan Council*, there was an agreement whereby the plaintiffs were granted sole rights to promote certain sporting activities on the grantor's land. Fees, on a prescribed scale, were to be paid to the grantor. The plaintiffs, acting on this agreement, did a great deal of work to prepare the site for the purposes for which they had acquired rights over it, but Kirklees Metropolitan Council, the defendants, made a direction, denying the plaintiffs the right to carry on the activities. The plaintiffs were entitled to compensation if they were interested in the land. (It is not clear from the evidence whether the plaintiffs were entitled to exclusive possession of all or any of the demised property). The phrase 'person interested' was widely construed by Eveleigh LJ, as involving a person who had a right in relation to land; this, he thought, was narrower than someone

who was directly concerned to make use of it—thus a bus company proposing to run services to the sporting activities would be directly concerned as to the use to which the land could be put, but would not have a right in or over it. However, the Town and Country Planning Act referred, in other sections, to 'interests in land', and the change to the less formal expression was, Eveleigh LJ considered, deliberate. However, even if he were incorrect on that point, he considered that the licensee had an interest in land. His reasoning is interesting. *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699 involved a perpetual licence that was irrevocable, and Sir Arthur Hobhouse, giving the advice of the Board, held that for the purposes of the New Zealand Public Works Act 1882 s 4, Plimmer was a person who had an 'estate or interest into, or out of, the lands vested . . . in the corporation', and was thus entitled to compensation. Indeed, the stated case before the Board asked baldly whether Plimmer had 'an interest in the land'. The Board had emphasised the need to construe such a section widely, to ensure that owners of private property were compensated. By parity of reasoning, the plaintiffs in *Pennine Raceway* had an interest in land. Three points emerge from this: first, Eveleigh LJ emphasises the context of the case, and it is perhaps understandable, where compensation from a public authority for compulsory confiscation of property or for an act which renders the property incapable of full commercial use is concerned, that the phrase should be widely construed, so as to prevent expropriation or deprivation without compensation. Even this argument, however, can be taken too far, as cases under the Land Clauses Consolidation Act 1845 adopt a more literal view: see, for example, *Frank Warr & Co Ltd v LCC* [1904] 1 KB 713; this may be, as Eveleigh LJ points out because 'interest in the land' is there used in the context of references to 'estates and interests in the land'. Second, Eveleigh LJ assumes that the phrase 'interest in land' is the same as 'interest in, to, or out of the land.' It is difficult to construe such phrases with confidence, especially in view of the different origins of the statutes in question, but it could be argued that the phrase in the New Zealand legislation is broader and less technical and that someone could have an interest out of the land without having a formal interest in land which an English land lawyer might recognise. However, Eveleigh LJ does not solely rely on points such as these, but states, baldly, at [1982] 3 All ER at 635j 'There has been a considerable development in the law in relation to equitable interests and I do not think that it is right to regard the category as closed.' Kerr LJ ([1982] 3 All ER at 636j) stated that 'an interest in land may in practice result from the application of equity to situations analogous to the present case'.

Stephenson LJ adopted a rather different approach. He could not see a difference between 'a person who has an interest in the land, a person entitled to an interest in it', and a 'person interested in the land'. He did not consider the phrase 'estate or interest in, to, or out of the land' but it may be surmised that he would not have regarded the distinction as significant. His Lordship's reasoning, at this point, is not easy to follow. He notes that it is unclear whether the plaintiff's interest amounted to an equitable interest in land. Notwithstanding this, he states that the plaintiff's interest, although not recognised by authority, is not one which authority forbids him to recognise, emphasising, as do the other members of the court, the context of a compensation statute. Given that, he found there to be no need to decide whether the

categories of equitable interests are closed. If this summary is accurate, his Lordship seems to be stating that there can be interests in land, not being equitable interests (and presumably not being legal estates or interests either). Unless these remarks are rigorously limited to the context of the case, such a conclusion seems contrary to principle, and it is submitted, that, whether his Lordship wished it or not, he did regard the licence as equivalent to an equitable interest.

Both cases, therefore, raise the question whether an estoppel licence, or proprietary estoppel, can amount to an interest in land. Some recent articles in The Conveyancer (A Briggs [1981] Conv 212, P N Todd [1981] Conv 347 and M P Thompson [1983] Conv 57) have questioned some of the fundamentals affecting licences. There is no doubt that there has been a tendency on the part of the courts to be flexible with respect to licences, and this flexibility has been particularly noticeable in what may conveniently be called estoppel licences. In *Crabb v Arun District Council* [1975] 3 All ER 865 at 875, for example, Scarman LJ suggested three questions: 'First, is there an equity established? Secondly, what is the extent of the equity if one is established? And thirdly, what is the relief appropriate to satisfy the equity?' The result in *Pascoe v Turner* [1979] 2 All ER 495 indicates how far-reaching the order of the court may be, but cases such as *Dodsworth v Dodsworth* (1973) 228 EG 1115 indicate that such remedies are not always necessary and that sometimes a financial solution, protected as necessary, by proprietary rights will suffice. Similarly, the use of the constructive trust, emanating from, or protecting, the contractual licence, has been seen as a way of giving judges a broad discretion: see Lord Denning MR in *Binions v Evans* [1972] 2 All ER 70 and Lord Denning MR and Goff LJ in *DHN Food Distributors v London Borough of Tower Hamlets* [1976] 2 All ER 462, but note the careful analysis of Browne-Wilkinson J in *Re Sharpe (a bankrupt)* [1980] 1 All ER 198. However, cases such as these concern the protection to be afforded to the licensee and do not, except perhaps inferentially, answer the question whether licences are interests in the land. The classic definition of an interest in the land is to be found in Russell LJ's judgment in *National Provincial Bank Ltd v Hastings Car Mart* [1964] Ch 665 at 696;

> 'rights in reference to land which have the quality of being capable of enduring through different ownerships of the land, according to normal conceptions of title to real property.'

It is also worth mentioning the proviso to LPA 1925 s 4(1), which states that:

> 'after the commencement of this Act, and save as hereinafter expressly enacted, an equitable interest in land shall only be capable of being validly created in any case in which an equivalent interest in property, real or personal could have been validly created before such commencement.'

This has not been judicially considered in the context of licences or, indeed, at all, and it is instructive to look at what its significance may be. The meaning seems clear, to the extent that if a licence amounted to an interest in land before 1926, it would do so today. The traditional view of licences is that they did not create interests in land: see *Wood v Leadbitter* (1845) 13 M & W 838, though some of the reasoning of the Court of Appeal in *Hurst v Picture Theatres Ltd* [1915] 1 KB 1 proceeds on the assumption that a contractual

licence may produce a property interest. This part of the decision has been disapproved by, for example, Latham CJ in *Cowell v Rosehill Racecourse* (1937) 56 CLR 605 at 616, and Megarry J in *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1970] 3 All ER 326. As far as estoppel licences are concerned, the leading case before 1926 is *Plimmer v Mayor of Wellington*, considered above. The Board's opinion makes it clear that a licence, at any rate if it were an occupation licence based on proprietary estoppel, for an indefinite period, and irrevocable, could amount to an 'estate or interest in, to, or out of the land'. The peculiar wording of the New Zealand legislation has already been the subject of comment. Perhaps the Board recognised that there had been an informal attempt to create a fee simple interest in the land and acted accordingly. On the other hand the significance that the case was given before 1926 is unclear: Challis, *Real Property* (3rd edn, 1911) does not even mention the case. It does, however, seem that this is a limited basis on which to erect an argument that there was in 1926, an established property interest which the legislature could recognise, but this proposition could very easily be controverted.

Whatever the force of this argument, there is no doubt that the judges, seemingly untrammelled by statute, have developed licences since 1925. The developments have occurred in several areas, but two main trends may be noted. First, the basis of estoppel licences appears to have become much more flexible: the restrictive requirements laid down by Lord Kingsdown in *Ramsden v Dyson* (1866) LR 1 HL 129 at 170, were expanded by Fry J into his five probanda in *Willmott v Barber* (1880) 15 Ch D 96 at 105–106, but in recent years a much broader approach, based on fraud and unconscionability, has been adopted. Very broad propositions were advanced by Oliver J in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897 and by Robert Goff J in *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank* [1981] 1 All ER 923, upheld by the Court of Appeal [1981] 3 All ER 577. (When Sir Robert Megarry V-C in *Haslemere Estates v Baker* criticised the dictum of Lord Denning MR in *Hussey v Palmer* [1972] 3 All ER 744 at 747–748, these cases do not appear to have been cited to him.) Certainly, if Oliver J was correct, then all that it is necessary to show is that the defendant's conduct is 'in the circumstances, unconscionable'—without the need for further technicality or refinement.

Second, there are dicta (for example in *Errington v Errington* [1952] 1 KB 290, *Binions v Evans*, and *ER Ives Investment Ltd v High* [1967] 1 All ER 507) which suggest that certain licences may bind third parties. These cases normally seem to involve occupation licences, and in no case has a third party purchaser without actual notice been bound. In *Pennine Raceway* the licence in question could possibly have been regarded as as occupation licence, and, if only by analogy with the rule in *Hunt v Luck* [1902] 1 Ch 428, occupation licences have been regarded as binding certain third parties: perhaps LPA s 14 may have some relevance here. However, in *Haslemere Estates*, there was no occupation of the property, and Sir Robert Megarry V-C, admittedly as a matter of first impression, did not advert to the distinction between occupation and non-occupation licences, seemingly regarding it as irrelevant. Third, the device of the constructive trust, uncertain in scope and content (see the criticisms of *Lyus v Prowsa Developments Ltd* above) has been used as a means of offering protection.

The whole area is badly in need of judicial clarification: the piecemeal development of recent years has led to a total uncertainty over what rights exist in any given situation and the protection to be afforded to such rights. It may be, as Lawson and Rudden argue (*The Law of Property* (1982) pp 217–223) that if the right purportedly created could, from its content, have been a life estate, a fee, a lease or an easement, then the fact that the document creating it does not use the appropriate formal language is irrelevant: the court, sub silentio, as it were, considers the substance, not the form. This may be a way of reconciling the results of the authorities, though it is propounding a theory that is not readily apparent from a reading of the cases. If the learned authors are correct then, in fact, justice has been tempered to fit a well recognised conceptual framework; however, the lack of clear judicial articulation of the premises upon which the argument is based is still unsatisfactory.

6 Mortgages

In the 1970s, there was much discussion about the availability of possession as a remedy for a legal mortgagee. The traditional view is that such a mortgagee has the right to go into 'possession before the ink is dry on the mortgage', per Harman J in *Four Maids Ltd v Dudley Marshall (Properties)* [1957] Ch 317 at 320. However, the question arises as to the relief available to the mortgagor. In equity, there have always been limited powers to adjourn for a short while an application for possession to enable the mortgagor to pay off the entire mortgage debt (*Birmingham Citizens Permanent Building Society v Caunt* [1962] 1 All ER 143.) A more general jurisdiction to restrain a mortgagee from obtaining possession has been stated by Lord Denning MR to exist 'except when it is sought bona fide and reasonably for the purpose of enforcing the security and then only subject to such conditions as the court thinks fit to impose,' (*Quennell v Maltby* [1979] 1 All ER 568 at 571), though this view was not shared by the rest of the court. However, by the Administration of Justice Act 1970 s 36(1) a wide discretion was given to the court to interfere where the mortgagee brings an action for possession of property which is, or includes, a dwellinghouse. *Halifax Building Society v Clark* [1973] 2 All ER 33 seemed to indicate that the section did not apply as intended to instalment mortgages, and the Administration of Justice Act 1973 s 8(1) attempts to resolve the difficulty, though *First Middlesborough Trading and Mortgage Co* (1974) 28 P & CR 69 indicates that reform may have been unnecessary.

Habib Bank Ltd v Tailor [1982] 3 All ER 561 (P H Kenny [1983] Conv 70, P H Kenny (1982) 74 LS Gaz 1241, H Wilkinson (1983) 133 NLJ 248) casts new light on the two sections in the Administration of Justice Acts, but makes no reference to any general jurisdiction. The mortgage in the case was a charge, by a bank, on the defendant's dwellinghouse to secure the defendant's overdraft and by its terms the defendant had covenanted to pay, on demand in writing, all moneys which might be owing by him to the bank. The defendant argued that the provisions of the statutes applied, but the bank argued that they did not, because there was no permission to defer payment and that, as this was a prerequisite for the section to operate, there was no discretion for the court to postpone the order for possession.

The court accepted that, if either Act applied, s 8(1) of the 1973 Act would mean that all that had to be taken into consideration was the outstanding interest on the mortgage, and that if there was a reasonable prospect that this sum could be paid off, the statutory discretion could be exercised. The section had been applied, after some critical examination of the drafting, by Goulding J in *Centrax Trustees Ltd v Ross* [1979] 2 All ER 952. However, that case involved a traditional mortgage, with a contractual date of redemption stipulated at six months, but with other provisions indicating that the mortgage could last indefinitely. The problem in the *Habib Bank* case was that there was no permission to defer. The nature of an overdraft against a current account is that the customer is not liable to repay the money unless and until the bank makes a demand. Since the money was not due until demanded, there was not—and could not be implied—any permission to defer. This was sufficient to decide the case, but in any event, the other requirement of s 8(1), that there must be provision for earlier payment, was absent.

As indicated above, the history of the Administration of Justice Acts and litigation under them has been chequered. Two decisions, *First Middlesborough* and *Centrax v Ross* have interpreted the Acts widely, to help protect the mortgagor, in accordance with the traditional attitudes of equity. Two other decisions, *Halifax Building Society v Clark* and *Habib Bank* have taken a very restrictive view. The effect of *Habib Bank* is that if a mortgagor enters into a standard type of mortgage, the mortgagee will not have an automatic right of possession, whereas if he enters into a mortgage to support an overdraft facility, the mortgagee has an automatic right. While a bank is likely to explain to the customer the financial consequences of various types of loan, it is unlikely that the availability or otherwise of the remedy of possession will be pointed out to the customer. It remains to be considered, however, whether there is an interpretation of the legislation which would enable the courts to treat the 'overdraft mortgage' as within the section. It is rare in the customer-banker relationship for an overdraft and its security to be agreed together; it is more likely that an overdraft is negotiated, subject to satisfactory security being provided by the customer. Sometimes, of course, the amount of the security will affect the amount of the overdraft. If there is a prior agreement, could it not be either expressly stated or implied in that agreement or in the conduct of banker and customer after that agreement that the mortgagor/customer can defer payment? If this is so, then the first hurdle of s 8 is overcome. The second requirement is that there must be provision for earlier repayment. This is a more difficult question, but again evidence might be forthcoming. The facts could well show that there was a provision for earlier repayment if there were a default (the bank might have required the overdraft to be paid off by instalments). The whole history of the transaction, including any relevant advertising and circulars produced by the bank, could be considered. Whether any such broadly-based arguments will be accepted depends on the attitude of the courts towards the mortgagee's right to his remedies. The traditional view of equity, especially where there is an individual mortgagee as distinct from a corporate borrower, has long been to protect the rights of the mortgagor, but Cumming-Bruce LJ in *Habib Bank* obviously regarded current banking practice as more significant. It is worth remembering that the legislation provides protection to owners of dwelling-houses, and that the effect of the absence of the statutory protection will be, as

in *Habib Bank* itself, to require the owner to give up possession very quickly. To hold the arrangement within the statutes would not necessarily be unfair to the bank/mortgagee because there is, after all, no *right* given to the mortgagor to be protected, only a discretion that can be exercised in his favour. Cumming-Bruce LJ emphasised current banking practice. By this he may well have meant the practices that bankers operate between themselves, and with commercial organisations. The banks' advertising, however, is directed to a much wider and less experienced audience, and it does bear repetition that banks deal with consumers as well as with the commercial world.

If *Habib Bank* is followed, it remains to be seen if Lord Denning's views in *Quennell v Maltby* on the general jurisdiction will be more widely canvassed. But *Habib Bank* displays a judicial unwillingness to apply what is, in effect, consumer legislation widely, and it is therefore unlikely that there will be any more willingness to apply a more general, unfettered, discretion.

Another case in possession (not reported in All ER), but where the provisions of the Administration of Justice Acts were inapplicable, was *Mobil Oil Co Ltd v Rawlinson* (1982) 43 P & CR 221; in this case a mortgagee seeking possession of a property not being a dwellinghouse was not allowed to set off against his mortgage arrears moneys allegedly due for breach of contract. These issues were nothing to do with each other, and the matters relating to breach of contract were therefore irrelevant to the possession action.

7 Restrictive covenants

Gilbert v Spoor [1982] 2 All ER 576 (P H Kenny [1982] Conv 452) was an appeal from the refusal of the Lands Tribunal to discharge in part, or to modify, certain restrictive covenants under the provisions of LPA s 84 as amended. The covenants were part of a scheme of development, and the real issue was whether a view, not from the benefitted land, but from nearby, was within LPA s 84(1A). The structure of s 84(1A) is worth noting. The Lands Tribunal is given a discretion to modify or discharge a restrictive covenant, provided that certain conditions are fulfilled. If the conditions are fulfilled, the Lands Tribunal must still consider whether to exercise its discretion to modify the covenants, but if the conditions are not fulfilled, there is no discretion to exercise. The requirements that the applicant has to satisfy were (1) either (a) that the restriction does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or (b) that it is contrary to the public interest, and (2) that money will be an adequate compensation. The case turned on (a), no argument being raised on (b). It therefore followed that if there was a sufficient benefit or advantage, the covenant could not be modified or discharged.

The first objection was that the enjoyment of the view could not be a practical benefit because it was not annexed to the land, the view not being from the land itself, but from nearby. The second objection was that there was no evidence to support the finding that enjoyment of the view was in fact a sufficient benefit or advantage. There are clear decisions of the Lands Tribunal that 'practical benefit' and 'substantial value or advantage' are not solely to be considered in money terms: see *Re Sadlington's Application* (1964) 16 P & CR 81, *Re Collett's Application* (1963) 15 P & CR 106 and *Re Bass Ltd's*

Application (1973) 26 P & CR 156. In the former cases and in *Re St Albans Investment Ltd's Application* (1959) 9 P & CR 536, a view was protected. Only in *Re Banks' Application* (1978) 33 P & CR 188, has a view been 'bought out'; the view in that case was over the South Devon coastline, but the Lands Tribunal (Douglas Frank QC) was manifestly influenced by the fact that 'over the years, particularly between the wars, there was constructed a considerable number of dwellings in extremely bad taste.' Even so, each objector received £2,000 for his loss. However, these cases related to views from the benefitted land, not from a point near to it. The Court of Appeal had little difficulty in finding that there was no relevant distinction. First, Eveleigh LJ held that the language of the section did not speak 'of a restriction for the benefit or protection of land, . . . but rather to a restriction which secures any practical benefits'. This, it seemed, moved the benefit from the land to the person—a view consonant with other parts of s 84(1A). However, Eveleigh LJ also took a broader stance, namely that the right to a view, even if not from the land itself, was something that touched and concerned the land and preserved the amenities of the neighbourhood. Certainly in the context of a scheme of development (and, perhaps because of LPA s 78, in a wider context, see *Federated Homes v Mill Lodge Properties* [1980] 1 All ER 371) this is realistic. One can imagine both an estate agent's description of the house and the advantages enjoyed by its owner and, perhaps, that a purchaser would be willing to pay more for—or at least influenced to purchase by—the excellent views. On the other hand, how far will this approach extend? Is a view from the entrance to a select residential development of a hundred acres of benefit to those who live on the far corner of the estate? Certainly the decision may inspire those who, in law, have the benefit of a restrictive covenant and, perhaps, those who have not, to object to any proposed change in restrictive covenants.

The final point in the case was to emphasise that the granting of an individual planning consent which would necessitate a modification of the restrictive covenant is not a decisive reason for allowing the modification. This is in accord with previous authority. Before 1969, planning considerations were not within the ambit of s 84; s 84(1B), however, provides that in any case falling within s 84(1A) the development plan and any ascertainable or declared pattern for the grant of planning permissions had to be considered. It had already been established in *Re Saviker's Application* (1973) 26 P & CR 441 that the grant of an individual planning consent did not of itself provide a reason for the Lands Tribunal to modify or discharge a covenant. Indeed, as was pointed out by the Lands Tribunal in a case before the 1969 amendments to s 84, *Re Hornsby's Application* (1968) 20 P & CR 495 at 503, 'vigilant insistence on the covenants has preserved the character and amenity of the estate to a standard which planning control would lamentably have failed to achieve.'

8 Adverse possession

The mysteries of adverse possession were further explored in *Hyde v Pearce* [1982] 1 All ER 1029 (Dockray (1983) 46 MLR 80), which Templeman LJ described as an 'odd little case'. The plaintiff had admittedly possessed the property for the statutory period, but it was unclear whether the possession

was adverse. In 1958 he had contracted, at auction, to buy the property, but had never completed the purchase, there having been a dispute about the amount of a small abatement due to him because of misdescription. He did, however, with the consent of the vendors, enter into possession as a licensee. Later in 1958 the vendors determined the licence, but did nothing to enforce their determination, and the plaintiff continued to occupy the property. The next relevant event was in 1972 when the land was transferred to the defendant, the area by then being one of compulsory registration. The case was heard in 1980, before the Limitation Act 1980 came into effect. The Court of Appeal found that the plaintiff had not acquired title, his possession not being adverse.

The first point to note is that though the land was registered, it does not seem to have been argued that the plaintiff had any rights under LRA s 70(1)(g). Since there was clearly a contract in respect of the land, there was surely a property right which s 70(1)(g) protected.

However, the case proceeded (again without reference to LRA s 75 or 70(1)(f)) on the basis that if the plaintiff had an interest in the land, it was by way of adverse possession. It was clear that the plaintiff amply fulfilled the requirement under the Limitation Act that he intended to possess the property; but the question remained whether the possession was adverse. The Limitation Act 1939 s 10(1) (now Limitation Act 1980 Sch I para 8(1)) used the phrase 'adverse possession' to refer to 'some person in whose favour the period of limitation can run', and the basic idea of adverse possession, laid down by Bramwell LJ in *Leigh v Jack* (1879) 5 Ex D 264, is that for there to be adverse possession, 'acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it.' It is clear that, during the period of the licence, adverse possession could not be present, but after the licence had been terminated, however, the position was uncertain. The purchaser had rights over the property—an equitable interest—and he could at any time have forced the vendors to complete. No evidence of either side purporting to repudiate the contract was produced. None of these actions seemed hostile, but under the Limitation Act 1939 (since amended) certain types of legitimate possession (for example, as a tenant at will) could amount to adverse possession. This point, however, was not considered by the court. There are cases where time ran even though a squatter had a valid defence to an action for possession: thus in *Moses v Longrove* [1952] 2 QB 238 and *Hughes v Griffin* [1969] 1 All ER 460 the courts considered that tenants (either under the Rent Restriction Acts or at will) could acquire title under the Limitation Acts. *Warren v Murray* [1894] 2 QB 648 was cited, but may be distinguishable on the ground that the case involved leases, and if time ran in favour of an equitable lessee, he would acquire not only a lease, but a freehold interest. However, after *Hyde v Pearce* it is unclear whether a good claim to lawful possession will ever amount to 'adverse' possession. Uncertainty exists where none existed before, and the purpose of adverse possession, to put uncertainties and doubts at rest, and to cure informalities, has to that extent been thwarted.

9 Commons

The Commons Registration Act 1965 has proved a troublesome piece of

legislation. Two cases this year, *Re Sutton Common, Wimborne* [1982] 2 All ER 376, and *Corpus Christi College, Oxford v Gloucestershire County Council* [1982] 3 All ER 995 indicate not only difficulties of statutory interpretation, but also a difference of judicial philosophy towards commons and towards the Act. Walton J, in the *Wimborne* case, regarded the onus of proof as being on the person who makes the registration, once the registration requires confirmation by a commons commissioner. In many cases, little proof will be needed, but if there is doubt, the commissioner will have to be satisfied by the person claiming that the registration should be made, even though this will involve the commissioner hearing someone who has no right under the legislation, and the regulations made under it, to be heard. Walton J also followed, uncritically, *Box Parish Council v Lacey* [1979] 2 All ER 113, in which the Court of Appeal had held that for land to be waste land of a manor, the land had, at the date of registrations, to be in unitary ownership. In the *Corpus Christi College* case, several points emerged. First, Lord Denning MR criticised both the legislature and some previous decisions (particularly the *Box* case) as placing too many difficulties in the way of preserving common land. He also criticised Walton J's decision in the *Wimborne* case, as treating the case as far too much of a lis inter partes. The hearing by the commissioner, he considered, should be regarded more as an administrative matter, to get the decision correct ([1982] 3 All ER at 1000d, g). Oliver LJ disagreed with this approach and, by implication, followed the view of Walton J in the *Wimborne* case (1009e–f). The point in the *Corpus Christi College* case was a technical one. Rights of common had been provisionally registered in the rights section of the commons register and an entry in the land section was made in consequence of the entry in the commons register. An objection was made to the entry in the commons register, but not to the entry in the lands register, with the result that, under the provisions of the 1965 Act, the registration became final. The provisional registration in the commons register was not confirmed by the commons commissioner, and it thus became void. The landowners applied to have the entry in the land register removed, but the county court, upheld by the Court of Appeal, refused to amend the register. There was a conclusive statutory presumption that the land was common land (and, not being land over which rights of common subsisted, it was therefore waste land of a manor), even though it was agreed on all sides that the land was not such waste land. Oliver LJ found some of the reasoning 'offensive' ([1982] 3 All ER at 1007b), especially when the need to object to both entries was not at all obvious to anyone but 'the most skilled and attentive reader.'

10 Miscellaneous

Three cases involving issue of land law are dealt with fully in other articles. *Barnett v Hassett* [1982] 1 All ER 80, involving a discussion of Class F Land Charges, is considered in the article on Family Law. *Sudbrook Trading Ltd v Eggleton* [1982] 3 All ER 1 (option to purchase lease—certainty) is discussed in the article on Contract and *Walker v Boyle* [1982] 1 All ER 634 (effect of Misrepresentation Act 1967 s 3 and Unfair Contract Terms Act 1977 s 11 on National Conditions of Sale (19th edn) condition 17(1)) is considered in the articles on Contract and Consumer Law.

Landlord and Tenant

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Introduction

It is no surprise that of the fifteen landlord and tenant cases reported in the 1982 All England Law Reports, thirteen are decisions on statutory provisions. The two pure common law cases both concern a rent review clause and the effect of a surrender, but in fact deal with wholly disparate points.

Common law

The first of the pure common law cases is *Torminster Properties Ltd v Green* [1982] 1 All ER 420. Under modern conditions a rent review clause has become the norm in commercial leases, unless the lease is for a very short term. The House of Lords gave considerable guidance in the approach to such clauses in *United Scientific Holdings Ltd v Burnley BC* [1977] 2 All ER 62, holding that the presumption is that time limits are not of the essence of the contract. Their Lordships further held that once an increased rent had been determined under the provisions of a rent review clause, that higher rent was payable retrospectively from the review date. The *Torminster* case raised a nice point on this retrospective effect which was not covered by authority. Stripped to its bare essentials the case concerned an elaborate rent review clause which provided that for the second five years of a 25 year term the rent should be the higher of the rent fixed for the first five years ('the original rent'), and the open market rental value ('the review rent'). Under the clause, in the events which happened, the review rent was to be determined by an independent arbitrator appointed by the President of the RICS. Before the arbitrator had been appointed the lessee, a limited company, had got into financial difficulties and was in liquidation. Subsequently the lessee's liquidator surrendered the lease to the lessor. Notwithstanding the surrender the arbitrator proceeded with the arbitration and eventually fixed a review rent higher than the original rent. The question of law which arose in an action by the lessor against the guarantors of the lessee's obligations was whether the lessor was entitled to the difference between the original rent and the review rent, in view of the fact that the arbitrator only made his award after the lease had been determined by surrender. The defendants argued that by reason of the surrender there had never been a valid determination of the open market rental value. The judge cited authority showing that, on the one hand, accepting a surrender does not extinguish rights of action for existing breaches of covenant or for rent already accrued, and that, on the other hand, it does deprive a landlord of the benefit of a tenant's covenant which is to arise and take effect after the surrender. In the instant case the facts fell somewhere between the two, for on the surrender the lessor had a present right not yet actionable to a future payment, because under the rent review clause the lessor was entitled to be paid from the review date the difference between the

original rent and the review rent, but this sum was not payable until the quarter day after the arbitrator fixed the review rent.

The judge rightly eschewed extreme dicta in both directions and reached a common sense conclusion. The lessee's duty to pay the difference between the original rent and the review rent after the review date was in his opinion correlative with the lessee's right to possession. The lessee had continued in possession after the review date and was therefore liable to pay the higher rent. The fact that the quantum of the rent was not fixed until after the surrender was irrelevant, though obviously the surrender put an end to the rent for the period after the surrender, when the tenant ceased to be entitled to possession.

New Zealand Government Property Corpn v HM & S Ltd [1982] 1 All ER 624, as already mentioned, was also concerned with a rent review clause and a surrender, though in this case it was a surrender by operation of law. A 72 year lease of Her Majesty's Theatre, Haymarket, was due to expire on 30 September 1970. As a business tenancy it continued in existence automatically by virtue of the Landlord and Tenant Act 1954 until the parties executed a new lease on 8 February 1973 for 21 years from 1 October 1970. The grant of the new lease of course operated as a surrender of the old lease by operation of law. The new lease provided for a rent review after seven years, the rent for the second seven years to be the 'open market rental value'. At various times the tenant for the time being had purchased and installed fixtures, such as seats in the stalls and auditorium. When the rent came to be reviewed, the question arose whether the fixtures were to be taken into account in fixing the open market rental value. The tenant admittedly had a clear right to remove tenant's fixtures at any time before the old lease as extended came to an end on 8 February 1973, but the landlord contended that the surrender of the lease on that date, albeit it was a surrender by operation of law, operated, in the absence of any express provision to the contrary, also as a surrender of the fixtures and a gift thereof to the landlords. Henceforward the fixtures constituted a part of the demised premises and were irremovable by the tenant and should therefore be taken into account in fixing the open market rental value. Dunn LJ recognised the logic of the argument, but did not regard it as a necessary consequence of the decided cases, which did not in fact lay down a clear and binding rule. At first instance Woolf J had expressed his view that

> 'the ordinary tenant, untutored in the intricacies of the law of landlord and tenant, would never expect that by taking a new tenancy he could, if nothing was said, lose the right, which could be of considerable value, to remove tenant's fixtures'.

It is not surprising that a Court of Appeal presided over by Lord Denning MR should have decided in favour of satisfying the reasonable expectations of the untutored tenant.

The law as laid down by the Court of Appeal seems to be as follows:—

(i) If the tenant surrenders his lease and vacates the premises without removing tenant's fixtures, he is held to have abandoned them.

(ii) If the tenant executes an express surrender of his lease or enters into an express agreement to surrender his lease, the surrender or agreement must be construed according to its terms.

(iii) In the absence of express provision a tenant has the right to remove tenant's fixtures so long as he is in possession as a tenant, whether by holding over, or as a statutory tenant under the Rent Acts, or on an extension of a lease of business premises under Part II of the Landlord and Tenant Act 1954. Agricultural tenants are an exception: at common law they had no right to remove tenant's fixtures and their position is now, of course, governed by the Agricultural Holdings Act 1948.

This decision will involve some rewriting of the textbooks, thought the more measured criticism of Fox LJ of the relevant passages in *Foa on the General Law of Landlord and Tenant* (8th edn, 1957), *Woodfall on the Law of Landlord and Tenant* (28th edn, 1978) and *Hill and Redman on the Law of Landlord and Tenant* (17th edn, 1982) is to be preferred to Lord Denning's dogmatic assertion 'those textbooks are wrong'. The decision represents another victory for common sense. As Fox LJ pointed out, were the rule otherwise it would always be open to the tenant, before the grant of a new lease involving the surrender of the old, physically to remove the fixtures and bring them back after the new lease had been granted. This would be expensive and wasteful formalism. The rule as laid down is sensible and workable. As applied to the facts of the case the actual decision was that rent should be assessed on the basis that the tenant's fixtures could have been removed by the tenant during the extended time of possession if he so wished and were not to be regarded as part of the 'demised premises' for the purpose of fixing rent.

Finally it should be noted that the report of *Poole's Case* (1703) 90 ER 934, as cited by Lord Denning MR on p 627, is clearly inaccurate. The report in 1 Salk 368, 91 ER 320, confirms that the quotation should conclude 'which are not removable'.

General statutory provisions

Lawrence Chemical Co Ltd v Rubenstein [1982] 1 All ER 653 raised a short point on s 1 of the Law of Distress Amendment Act 1908. This section, it will be recalled, in general terms provides that where a landlord levies a distress on goods on the demised premises, and those goods belong not to the tenant but to a third party, the third party, not being himself a tenant, may protect his goods by serving on the landlord a notice complying with the requirements of the section. The exact words relevant for present purposes are that the third party should serve the 'landlord . . . with a declaration in writing made by' the third party.

The facts were that the third party was a company, and a declaration in due form had been signed by a solicitor on behalf of the company. Although he had orally been authorised to do so by a leading director of the company and the authorisation had subsequently been formally ratified by a resolution of the board, it was contended that his signature was insufficient. The Court of Appeal referred to three arguments which supported this contention. First there was an unreported case, *Greylands Finance Ltd v Millican Investment Co Ltd* where the point had arisen and Cusack J had held that a signature to be effective must be that of a person who has direct knowledge of the relevant facts, such as knowledge that would be possessed by a secretary or a director

of the company. Secondly, in *Lawrence Chemical Co Ltd v Rubenstein* itself the trial judge seems to have decided against the validity of the signature on the ground that only a signature by a director, or possibly the secretary, would be effective, since otherwise it could not be said that it was the company's declaration made by the company. Thirdly, on appeal in the same case counsel for the landlords argued that in order to be a declaration made by the company it had to be made by the company in the most solemn and official way available, namely by the affixing of the company's seal with due attestation.

The Court of Appeal rejected each of these arguments. It recognised that a limited company can only act by an agent, and cited earlier Court of Appeal authority to establish that s 1 of the 1908 Act allows signature by an agent, even though there is no express reference thereto in the section. Since the 1908 Act operates to deprive a distraining landlord of his common law rights it should be construed strictly in his favour. In the instant case this meant that the question was whether the solicitor was duly authorised to make the declaration. The law of agency does not normally require any special formalities on the appointment of an agent, and this was not a case where the principles of company law required any formality such as a seal. The solicitor purported to act as agent for the company and was duly authorised to do so. The declaration was effective.

It is respectively submitted that this is a useful and sensible decision. Both Arnold P and O'Connor LJ observed that if the authority given by the director was defective, it was cured by the resolution of the board. Neither of them discussed what the position would have been in the absence of the resolution. Presumably the landlord could in such a case seek to establish that the agent had not got due authority. In practice this would be likely to be a difficult task, and applying the agency principles in relation to contracts, the company would seem to be able to validate the declaration and defeat the landlord by passing an appropriate resolution ratifying the authorisation.

Bromley Park Garden Estates Ltd v Moss [1982] 2 All ER 890 raised two questions relating to the unreasonable withholding of consent to the assignment of a lease within s 19(1) of the Landlord and Tenant Act 1927. The first question related to the matters that may be taken into account in deciding the question of unreasonableness. The judge below had relied upon the statement in *Woodfall* that 'a landlord may reasonably be influenced in his decision by considerations of the proper management of the estate of which the demised property forms part'. All the judges in the Court of Appeal agreed that this proposition states the law too widely, but on the other hand Dunn LJ said expressly that the courts do not confine themselves to narrow considerations as to the personality of the proposed assignee or the subject matter of the lease as had been done in some of the older cases. One of the best known of the older cases is *Houlder Bros & Co Ltd v Gibbs* [1925] Ch 575, which has often been cited as authority for the narrow view. It met with some disapproval, obiter, in the House of Lords in *Tredegar (Viscount) v Harwood* [1929] AC 72, but was regarded by the Court of Appeal as a binding authority in *Lee v K Carter Ltd* [1948] 2 All ER 690. A majority of the Court of Appeal in *Bickel v Duke of Westminster* [1976] 3 All ER 801 also adhered to this view, but not for the first time it looks as if the heterodox view of Lord Denning may ultimately prevail. Lord Denning insisted that the cases mentioned do not lay

down propositions of law. 'The reasons given by the judges are to be treated as propositions of good sense—in relation to the particular case—rather than propositions of law applicable to all cases'. A passage from Lord Denning's judgment, including this sentence, was expressly approved by the Court of Appeal (not including Lord Denning) in *West Layton Ltd v Ford* [1979] 2 All ER 657, and seems to have been implicitly assumed to represent the law in the *Bromley Park* case.

According to the *Bromley Park* case the right approach in considering whether the landlord's refusal of consent is unreasonable is to look first of all at the covenant in the context of the lease and ascertain the purpose of the covenant in that context. If the refusal of the landlord was designed to achieve that purpose then it may not be unreasonable, even in the case of a respectable and responsible assignee: it may be noted that in this context it is accepted that the landlord has only to consider his own interest. But if the refusal is designed to achieve some collateral purpose wholly unconnected with the terms of the lease, that would be unreasonable, even though the purpose was in accordance with good estate management. It also appears, particularly from the judgment of Cumming-Bruce LJ, that it is reasonable for the landlord to refuse consent where he reasonably apprehends that the consequence of an assignment would be damaging to his interests, including his interest in neighbouring property, but unreasonable where he seeks to gain some uncovenanted advantage by refusing to honour the right of the tenant to assign. Accordingly in the *Bromley Park* case it was unreasonable for the landlord to refuse his consent for the purpose of destroying the lease or merging it with another lease in the same building, even though that might be good estate management and advantageous to the landlord.

The second question in the *Bromley Park* case was only discussed by Slade LJ, though both the other judges expressly concurred in his view. This question is whether at the trial the landlord is entitled to rely on reasons which were not given to the tenant when consent was refused. In principle Slade LJ thought that there was much to be said for the view that he should not be permitted to adduce such reasons, but he recognised that cases such as *Sonnenthal v Newton* (1965) 109 Sol Jo 333 and *Welch v Birrane* (1974) 2 P & CR 102 appear to establish the contrary. Assuming that this is the legal position, he went on to state that in his view it was clear that a landlord can only rely on reasons which actually influenced him at the time of refusing consent, and cannot rely, for instance, on subsequent changes of circumstances.

In *SEDAC Investments Ltd v Tanner* [1982] 3 All ER 646 a highly technical and unmeritorious defence succeeded. Due to the failure of the lessee to comply with the repairing covenant in the lease the front of the demised premises became dangerous and in urgent need of repair. The lessee informed the lessor of the emergency, and the lessor forthwith caused the repairs to be done. At this stage neither the lessor not lessee was aware of their respective legal rights and obligations. The lease fell within the Leasehold Property (Repairs) Act 1938, as amended, and accordingly under s 1(2) of that Act the lessor, as a first stage in proceedings for damages for breach of the repairing covenant, served a s 146 notice on the lessee. The lessee successfully contended that the notice was not a valid notice on the ground that, leaving aside cases where the breach is incapable of being remedied, s 146 of the Law of Property Act 1925 contemplates that there has been a failure to remedy the

breach complained of. Since the lessor had executed the repairs before the notice was served, the notice did not, and indeed could not on the facts, be a valid notice within s 146 and s 1(2). The proceedings, therefore, failed at this first stage and did not even reach the point at which the court has jurisdiction, if one of the five specified sets of circumstances is established, to grant leave to the lessor to commence an action for damages. The whole procedure is dependent on the service of a valid notice under s 146.

The judge observed that in theory the lessor, had he been aware of the legal position, could have protected himself in other ways, but he further observed that those other ways were not of any practical value in a case of real emergency. He also noted that the statutory restrictions cease to apply when there are less than three years of the lease to run: possibly he had in mind *Baker v Sims* [1958] 3 All ER 326 where it was held that the leave of the court was not required where the lease had been surrendered. But, as he also pointed out, it then depends upon the chance of timing, for in due course the right of action will be barred by the Limitation Act 1980.

It would have been difficult for the judge to decide otherwise, but some small amendment of the Act is called for, as it is wrong that the merits of the lessor's case could not be heard. Had the judge been able to give leave, the lessor would have faced other difficulties which the judge quite properly did not explore.

Business tenancies

O'May v City of London Real Property Co Ltd [1982] 1 All ER 661 is the most important 1982 decision on business tenancies. In it the House of Lords answered basic questions that the case raised as to the proper approach to be taken by the courts on applications by business tenants for a new lease under the Landlord and Tenant Act 1954. Factually the essence of the case was that under the old lease the landlord had been responsible for maintenance, repairs and services in respect of the building and any structural damage without recourse to the tenants, and the landlord proposed that the new lease should be a 'clear lease' under which the tenant would be liable to pay a service charge which would cover all the landlord's expenses in relation to maintenance, etc, compensation being made to the tenant by a reduction of the reserved rent.

Lord Hailsham LC deduces three general propositions from ss 33–35, which deal with the terms of the new tenancy. First, Parliament did not intend, apart from certain limitations, to protect the tenant from the operation of market forces in the determination of rent. Secondly, in contrast to determination of rent, it is the court and not the market forces which, with one vital qualification, has an almost complete discretion as to the other terms of the tenancy. Thirdly, in deciding the terms of the new tenancy, as to which its discretion is otherwise not expressly fettered, the court must start by 'having regard to' the terms of the current tenancy and to all relevant circumstances. Both Lord Hailsham and Lord Wilberforce, with whose speeches the other Law Lords agreed, made it clear that although the mandatory guideline or direction to have regard to the terms of the current tenancy does not mean that the terms of that tenancy are frozen or petrified, the burden of persuading the court that there should be a change in the terms against the will of the other party rests fairly and squarely on the one who

proposes the change. The court must be persuaded that in all the circumstances the proposed change is fair and reasonable taking into account, where the landlord proposes the change, the comparatively weak negotiating position of a sitting tenant requiring renewal and the general purpose of the Act which is to protect the business interests of the tenant so far as they are affected by the approaching termination of the current lease. In the light of their Lordships speeches it is submitted that the four test approach proposed by the trial judge and accepted by the Court of Appeal (though they did not agree with the way he had applied it) can no longer be relied on, and if, and in so far as, valid, is subject to the important qualifications discussed by Lord Hailsham.

On the facts, while on the one hand it was entirely reasonable for the landlords to wish to transfer the burden of the expense of maintenance etc to the tenant, a burden of a fluctuating and unpredictable character, it was on the other hand, equally reasonable for the tenants to wish to resist the change. Their Lordships had no doubt that the landlords had failed to discharge the burden of showing that it was fair and reasonable for the court to sanction a recasting of the terms of the lease so as to transfer the risk of property management to tenants with a limited interest. It was not sufficient that the landlords wished for the change and that, as the evidence showed, new leases of comparable properties were commonly clear leases.

The only doubt in their Lordships' minds arose from the fact that the trial judge, whose discretion it was, had decided in favour of the landlords. There was no weakening of the respect which an appellate court must give to the exercise of discretion by the trial judge, but in this case there had been a misunderstanding of part of the evidence, and the judge had lost sight at the critical point of the vital question whether, even for monetary compensation which arithmetically might be fair, the case for compelling the tenants to accept such compensation in exchange for the transference of burden was made out.

It may be added that the stress laid upon the shortness of the term—three years—perhaps leaves some scope for arguing for a different view in the case of a longer lease, though it must be remembered that the statutory jurisdiction does not extend to the granting of a lease for more than 14 years.

It will be convenient to deal together with *International Military Services Ltd v Capital & Counties plc* [1982] 2 All ER 20 and *Cardshops Ltd v John Lewis Properties Ltd* [1982] 3 All ER 746, in which the Court of Appeal approved the earlier decision on the same point. As it is well known in certain circumstances a business tenant is entitled to compensation for disturbance on being required to quit the premises, and in both cases the tenant was entitled to compensation under s 37(2)(b) of the 1954 Act. In its original form the amount of compensation was the rateable value of the holding, but this was increased by the Local Government, Planning and Land Act 1980, and the Landlord and Tenant Act 1954 (Appropriate Multiplier) Regulations 1981 to 2¾ times the rateable value. In both these cases the question was whether the tenant was entitled to compensation at the old or the new rate. In both cases it was held that the tenant was entitled to the new, higher rate.

The *Cardshops* case was the stronger one from the landlord's point of view. The timetable of events was as follows:

3 January 1980	—Landlords serve notice under s 25 terminating the tenancy on 25 December 1980
6 March 1980	—Tenants serve counter-notice
24 April 1980	—Tenants apply to county court for a new tenancy
13 November 1980	—Local Government, Planning and Land Act 1980 passed
21 January 1981	—Landlord and Tenant Act 1954 (Appropriate Multiplier) Regulations 1981 made
18 February 1981	—Judgment for the landlord refusing new tenancy and making order for compensation
25 March 1981	—Regulations come into operation
29 June 1981	—Date of termination of tenancy on which tenants obliged to quit. Owing to a misunderstanding the tenants actually quit on 7 July but it was held this could not affect their right of compensation.

The county court judge held that the regulations did not apply and the tenant was entitled to compensation at the lower rate. According to Waller LJ the judge did not identify the crucial date, but Ackner LJ asserts that he chose the date of the termination of the tenancy specified in the landlord's notice. Eveleigh LJ, dissenting, said that this was only one of four possible dates contended for by the landlord, the others being the date of the landlord's notice, the date of the tenant's notice and the date of the application for a new tenancy. Eveleigh LJ himself was firmly of the opinion that the relevant date was the date of the landlord's notice. In his view at that time they had a right to possession on payment of a sum there and then determined. To increase the amount of compensation by applying the regulations would give them retrospective effect: it would impair the landlord's right to possession and increase their obligation.

The majority however held that s 37 entitled the tenant to compensation on the quitting of the holding and not before, and that the natural construction was that the entitlement should be assessed in accordance with the law at that time. Nor did they consider that this involved any retrospective effect: the landlords right to possession was not taken away from him—it was merely an increase in the price of exercising that right. There is, it was said, nothing retrospective in saying that compensation would be on the basis of the law current at the date of quitting.

According to the timetable of events any solution could produce anomalies. The law is at least clear, and one can in broad terms see the strength of the argument that it is no injustice to the landlord. The policy of the legislation is to hold the balance between the landlord and the tenant with an obligation on the landlord to pay fair compensation to the tenant on being required to quit the holding. If the amount payable was not achieving fairness, the landlord does not suffer injustice by having to pay what Parliament views as proper compensation. It may, however, be difficult to convince a landlord who has given notice thinking that he knows the price of so doing, that it is fair that he should have to pay 2¼ times that amount when the tenant leaves some 18 months later.

As Oliver LJ observed, in giving the judgment of the Court of Appeal in *WJ Barton Ltd v Long Acre Securities Ltd* [1982] 1 All ER 465 the point raised was fairly short and simple, but had potentially far-reaching implications.

The dispute arose in connection with the fixing of the new rent for shop premises with no peculiar features in a business area containing plenty of comparable properties. The county court judge had made an order directing the tenants to disclose all documents relating to trading both at the premises in question and also at other premises about seven miles away at which the tenant traded under a lease from another member of the group to which the landlord belonged. The court did not concern itself with the details of the order, but with the general question whether evidence of a tenant's trading in business premises was relevant or admissible in ascertaining the open market rent. It will be remembered that the Act expressly states that any effect on rent from the tenant's occupation and from goodwill attached to the premises as a result of the business which the tenant has carried on is to be disregarded.

The landlords were able to quote a statement in *Woodfall* that 'Evidence of the trading accounts of the existing business is admissible for the purpose of showing the earning capacity of the premises but not for any other purpose'. The court accepted that this was accurate so far as it went in relation to *Harewood Hotels Ltd v Harris* [1958] 1 All ER 104, the authority cited in support, but did not accept it as a general proposition that the tenant's business accounts are always relevant material. *Harewood Hotels Ltd v Harris*, also a Court of Appeal decision, was distinguished as involving rather unusual hotel premises as to which there were no real comparables—those mentioned were private houses not adapted for use as a hotel. Evidence as to the tenant's accounts was there held to be admissible, not for the purpose of seeing what the tenant could afford to pay, but to assist in ascertaining what a new person, an outsider, would be prepared to pay. For this purpose the prospects of the hotel, having regard to the law of supply and demand, were relevant. In *Barton's* case the court felt bound by *Harewood Hotels Ltd v Harris* to hold that there may be cases where the production of trading figures may be both relevant and admissible, but they were clear that there is no general proposition that such evidence is relevant and admissible. It may be admissible where the ascertainment of an open market rent may depend on an assessment of the likely profitability of the business for which the premises are peculiarly adapted, such as an hotel, a petrol filling station, a theatre or a racecourse. It is not however admissible in the ordinary case of shop premises with no peculiar features in a business area where there are plenty of comparable premises from which the open market rent can be deduced.

The last case on business tenancies, *Robert Baxendale Ltd v Davstone (Holdings) Ltd* [1982] 3 All ER 496 which was heard together with *Clemente Carobene v John Collier Menswear Ltd*, indicates the importance attached, and in this context it is submitted properly attached, to strict adherence to time limits. In both cases the landlords served notice on the tenants under s 25 terminating the lease and stating that they would not oppose an application to the court for a new tenancy. In both cases the tenants in due time served a counter-notice on the landlords and applied to the court for a new tenancy, but in both cases they failed to serve the relevant documents on the landlords within the time specified in the county court rules. Under CCR 1936, Ord 8, r 35 'where reasonable efforts have been made to serve' the application the registrar had power to extend the time provided that the extension was sought before the time had expired. On the basis of this order it was clear that no extension could be granted in either case because no reasonable efforts had

been made and the time had expired. CCR 1936 Ord 13, r 5, however, as was held in *Lewis v Wolking Properties Ltd* [1978] 1 All ER 427, gives the court discretionary power to extend time in any case notwithstanding Ord 8, r 35—the provisions of this latter rule are directory rather than mandatory. The discretion, it is clear, is to be used very sparingly: it was properly exercised in favour of the tenant in *Lewis v Wolking Properties Ltd* where the failure to serve was caused entirely by the landlord moving without informing the tenant. A tenant in fact has to clear two hurdles and in neither of the recent cases did he clear the first one. The first thing he must do is establish that there are unusual or exceptional circumstances and both Waller and Ackner LJJ made it clear that the circumstances must relate to the failure to serve in time. It is not enough to show that the legal advisers overlooked the time limits or misunderstood the rules as to service and that unless time is extended the tenant will lose his right to a new lease. This may be a hardship to him but it does not involve any unusual feature. It is only if this first hurdle is cleared that the court is in a position to consider exercising its discretion and at that stage it will have regard to the degree of hardship which the tenant will suffer if the decision goes against him. In evaluating the tenant's hardship it is permissible to take into account the existence or absence of a claim by the tenant against his solicitors for failing to serve in time.

As Waller LJ pointed out, the 1954 Act has seriously interfered with the landlord's right to possession of his property. The Act and the rules set out a timetable and there is nothing unfair in the timetable being strictly adhered to. Indeed it is only fair to the landlord that it should be, as otherwise his period of uncertainty would be prolonged. If the time for service has passed, the landlord has ceased to be under an obligation to provide his tenant with a new lease and the court will not normally at this stage grant an extension. There is an analogy with the decisions on the RSC Ord 6, r 8 which hold that as a general rule the court will not extend a writ retrospectively so as to defeat a limitation defence.

The headnote to *Robert Baxendale Ltd v Davstone (Holdings) Ltd* refers to the 1981 County Court Rules, the relevant parts being set out in a footnote. As is there noted, however, these rules did not come into operation until 1 September 1982, after this case was decided, and the court was therefore only concerned with the CCR 1936, the new rules not being mentioned in the judgments. The new CCR are very similar to the corresponding RSC, and the changes made in the CCR are similar to those made some years ago in the RSC. So far as the RSC are concerned the earlier cases were reviewed by Ungoed-Thomas J in *Re Chittenden (decd)* [1970] 3 All ER 562. The old RSC had an Ord 8, r 1, corresponding to CCR Ord 8, r 35 authorising renewal of a writ if the court is 'satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons' and an Ord 64, r 7 corresponding to CCR Ord 13, r 5, giving the court power to enlarge the time appointed by the rules although the application was not made until after the expiration of that time. These rules were replaced in the 1962 revision by RSC Ord 6, r 8 and this was repeated unaltered in the final stage of the revision in 1965. The new order omits the words 'if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons' but it seems clear, on the authority of *Re Chittenden (decd)* and the cases there cited, that this omission did not change the law in any material respect. It also, though in different language, authorises an extension after the time for service has expired.

CCR 1981 Ord 7, r 20, is drafted in substantially the same terms as RSC Ord 6, r 8, and in a similar way repeats the effect of CCR Ord 8, r 35 and Ord 13, r 15, with similar changes of language. In the light of the decisions on the RSC it seems safe to assume that the law is substantially unaltered and that the rules in the High Court and the county court are now substantially the same. It was, of course, a purpose of the 1981 CCR to further the assimilation of the rules of the High Court and the county court. It is submitted that the approach of the court in *Robert Baxendale v Davstone (Holdings) Ltd* is equally appropriate to the new rules.

Agricultural holdings

In *University College, Oxford v Durdy* [1982] 1 All ER 1108 the landlords served due notice under s 8(1) of the Agricultural Holdings Act 1948 demanding a reference to arbitration as to the rent that the tenant should pay for the three years commencing 'from the next ensuing day on which the tenancy could have been determined by notice to quit given at the date of [this demand]', ie 2 February 1981. The landlord and tenant did not agree on an arbitrator; so on 10 December 1980 the landlords called on the Minister to appoint an arbitrator. By an instrument dated and sealed on 29 January 1981 the Minister appointed an arbitrator who had already agreed to act. Notice of the appointment reached the landlord on 2 February but did not reach the tenant until 3 February. Griffiths LJ and, semble, Eveleigh LJ took the view that *Sclater v Horton* [1954] 1 All ER 712 is binding Court of Appeal authority for construing s 8 as incorporating a timetable into applications for a rent review. It requires that the date of the reference to arbitration must precede the date on which the tenancy could next be determined by a notice to quit, ie in the instant case 2 February 1981. It also decides that 'the date of the reference' is the date by which the arbitrator had been appointed and accepted his appointment. The further point that arose in *University College, Oxford v Durdy* was whether notice had to be received by both parties before the appointment of the arbitrator was effectively completed. All the members of the Court of Appeal agreed that, whatever the position might be in commercial arbitrations which require co-operation between the parties in appointing an arbitrator, in the case of an appointment by the Minister under the 1948 Act, the appointment was complete once the appointment had been made in writing and the arbitrator had agreed to act.

The decision contemplates (as indeed happened by one day in *University College, Oxford v Durdy*) that notice may be received after the date of the appointment. In the light of this some difficulty was felt over para 6 of Sch 6, which requires the parties to deliver their statement of case within 28 days of the arbitrator's appointment. All the members of the court were agreed that this provision must be given a benevolent construction and implicitly required that a party must have received notice of the appointment before time starts to run against him.

Kerr LJ reached the same result as other members of the court but took a radically different view on the authority of *Sclater v Horton*. There is no doubt that the facts in that case were very different from those in *University College, Oxford v Durdy* and in the opinion of Kerr LJ it would be an abuse of the doctrine of precedent to treat it as governing the interpretation of s 8 for

the purposes of the later case. He deployed what Griffiths LJ called a powerful argument based on the elasticity to be attached to 'the reference' in arbitration proceedings—an argument which if made at the time might have persuaded the court in *Sclater v Horton* to a different conclusion. Having, he believed, freed himself from the strait jacket of *Sclater v Horton* Kerr LJ pointed out the injustice that might flow from adherence to the requirement of a strict timetable: if the Minister by an oversight failed to seal the appointment in due time, or the acceptance by the arbitrator of the appointment was inadvertently delayed, the landlord would have to wait two years before having the opportunity of an increase in the rent, with no prospect of suing anyone for his loss. In his view though there should be a close proximity between the arbitrator's appointment and the date on which the tenancy could next be determined by a notice to quit, it was not vital that the appointment should come first.

Interesting thought the views of Kerr LJ may be, it is submitted that opinion of the majority should be followed, namely that the Court of Appeal in *Sclater v Horton* regarded the construction of s 8 as vital to their decision, and their decision thereon (now followed in *University College, Oxford v Durdy*) is binding authority unless and until a different construction is placed upon it by the House of Lords.

A differently constituted Court of Appeal had to consider the procedure for compensation for new improvements in *ED & AD Cooke Bourne (Farms) Ltd v Mellows* [1982] 2 All ER 208. Under the 1948 Act there is set up a two-stage procedure in place of the one-stage procedure under the 1923 Act. The first stage is a notice in writing of an intention to make a claim, and this is sufficient if it specifies the nature of the claim by specifying the statutory provision, custom or term of agreement under which the claim is made. The second stage is a statement of case pursuant to para 6 of Sch 6 which has to state all necessary particulars. The 28 day time limit for delivery of this statement was considered in *University College, Oxford v Durdy* and has already been discussed. Until the time limit is reached there is freedom to amend or add to the statement or particulars, but thereafter it is only allowed 'with the consent of the arbitrator'. At the hearing each party to the arbitration is confined to matters alleged in the statement and particulars delivered by him and any amendment thereof or addition thereto duly made.

In the present case the arbitrator had refused to allow the tenants to amend their statement of case, and the county court judge had affirmed this on the ground that there was no valid statement of case to amend since the original statement had not included 'all necessary particulars'. The Court of Appeal made it clear that this was a wrong approach. As Templeman LJ observed: 'It cannot be right to refuse an amendment because an amendment is necessary'. In the opinion of the court Parliament in para 6 recognised that the draftsman of the statement of case may be fallible, gave him a right to amend until the 28 day time limit had been reached, and gave the arbitrator power to allow amendments after that date. Cumming-Bruce LJ said that considerations of justice and fairness make it appropriate ordinarily to allow an amendment if after the amendment the respondent will know sufficiently the case that he had to meet. Templeman LJ's observations can, perhaps, be regarded as an explanation of 'ordinarily'. He said that amendments ought to be allowed as of course unless the landlords have a strong case for saying that because the

tenants got it wrong in the first place and because the landlord has altered his position or for some other reason it would be unfair to allow the amendment. He suggested that the test should be 'whether the landlords are any worse off than they would have been if the statement of case had been properly drafted in the first place'. On the facts the county court judge had no doubt that the amendments proposed could be effected without manifest or grave injustice to the landlords, and the Court of Appeal thought he was clearly right.

A printing error should be noticed on p 223 line b4 where 'statement of particulars' should read 'statement or particulars'.

Residential tenancies

The two Rent Act cases elucidate points of detail in two of the Cases in Schedule 15.

First, *Leith Properties Ltd v Springer* [1982] 3 All ER 731 where the essential facts can be simply stated. In 1975 the landlords let a flat to a tenant on a quarterly tenancy, the tenancy agreement containing no prohibition of sub-letting. Shortly afterwards without seeking the consent of the landlords the tenant sub-let the flat to the defendant. By 1979 the head tenancy had become a statutory tenancy. In due course the landlords served a notice to quit on the tenant expiring on 26 March 1981 and on its expiry brought a possession action against both the tenant and the sub-tenant. The Court of Appeal was concerned with the appeal of the sub-tenant against the possession order made by the county court judge as far as it concerned him.

The order for possession was made under Case 6, ie on the ground that the tenant had sub-let the whole of the dwelling-house, and the sub-tenant relied for his defence on s 137.

Two points were decided by the court in line with previous authority. It is settled that a sub-tenant can only bring himself within s 137 if there has been a lawful sub-letting. It was clear that at common law the sub-letting here was perfectly valid, for it took place while the tenancy was still contractual and there is no doubt that at common law, if a lease is silent on the matter, the tenant may grant an effective sub-lease without the landlord's consent. Sub-letting by a statutory tenant of course gives rise to quite different considerations. The landlord however argued that having regard to the wording of Case 6 premises cannot be said to be lawfully sub-let within s 137 in any case where they have been sub-let without the landlord's consent. The court firmly dismissed this argument as wholly ill-foundèd. Case 6 does not make a sub-letting unlawful: it merely makes sub-letting without consent a ground for possession.

The more difficult point concerned the nature of the protection given to a sub-tenant by s 137. As the court observed the rights of the sub-tenant do not necessarily stand or fall with those of the tenant; he is entitled to have his rights independently considered and ascertained. However even a lawful sub-tenant remains vulnerable to possession proceedings where the head landlord can make out against him a case under s 98(1) and Sch 15.

The sub-tenant argued that the landlords could not succeed against him because under s 137(2) he was deemed to become the tenant of the landlord and he must accordingly be treated as the tenant for the purposes of Case 6. On this footing the conditions of that case were clearly not satisfied for he

(the sub-tenant) had not sub-let. The court, however, held that the term 'tenant' is a generic term which in some contexts must be read as referring simply to the last immediate tenant of the landlord and not as including a sub-tenant. It had been clearly established in *Lord Hylton v Heal* [1921] 2 KB 438 in relation to what is now Case 5 (notice to quit by tenant) that an order for possession may be made against a lawful sub-tenant even though the sub-tenant himself has not given any notice to quit because the notice served by the immediate tenant of the landlord is the relevant notice even in proceedings as between landlord and sub-tenant. It was held in the instant case that in Case 6 'tenant' must likewise refer to the immediate tenant of the landlord rather than to any sub-tenant against whom possession is sought. Any other construction, it was observed, would render Case 6 more or less useless to a landlord.

Finally it may be noted that Case 6 is one of the Cases where the court can only make an order for possession if it considers it reasonable to do so. The county court judge had not considered the question of reasonableness as he had held that the sub-letting was unlawful and the sub-tenant not within s 137. Accordingly the case was remitted to the county court judge for him to consider the question of reasonableness.

The second Rent Act case is *Patel v Patel* [1982] 1 All ER 68. Here the plaintiffs, husband and wife, were the administrators of the estates of the brother and sister-in-law of the first plaintiff who were killed in a car accident in 1977 leaving two small children to whom the plaintiffs became guardians in 1978 and whom they subsequently adopted in 1980. In 1979, as administrators, they let a house which had been jointly owned by the deceased to the defendant (who was not a relative) for one year. On the expiry of the term the defendant held over as a statutory tenant. Shortly afterwards the plaintiffs claimed possession under Case 9 on the ground that the dwelling-house was reasonably required for occupation as a residence for themselves. They wished to live in the house with the deceaseds' children who were the beneficial owners on their parents' intestacies.

The county court judge found that the plaintiffs reasonably required the house for occupation as a residence for themselves, that the defendant had not succeeded on the ground of greater hardship, and that it was reasonable to make an order for possession. Nevertheless he refused to make an order considering that he was bound to refuse by authority, namely *Sharpe v Nicholls* [1945] 2 All ER 55 and *Parker v Rosenberg* [1947] 1 All ER 87. Certainly there are dicta in these cases and also in *Harrison v Hopkins* [1949] 1 All ER 87 to the effect that personal representatives having no beneficial interest in the dwelling-house in question cannot avail themselves of the provisions of Case 9. These dicta are however misleading and, as explained in *Patel v Patel*, the true ratio of those cases is that a personal representative normally cannot claim possession under Case 9 because in so doing he would be acting in breach of trust. On the facts of this case the plaintiffs were clearly the landlords and the defendant could not challenge that status. Nor is there anything in the Rent Act 1977 which says that personal representatives cannot be landlords. In the exceptional circumstances of the case the personal representatives were not acting in breach of trust in seeking to live in the house with the children, the beneficial owners. There was no answer to the simple proposition that the plaintiffs, as the defendant's landlords, had

established a ground which entitled the judge to make an order for possession, and the questions of hardship and reasonableness having been answered in favour of the landlord, he should have made the order.

Tandon v Trustees of Spurgeon's Homes [1982] 1 All ER 1086, a House of Lords decision, reversing the decision of the Court of Appeal, is, in some ways, the most interesting of the year's landlord and tenant cases. The tenant ultimately succeeded by a bare majority in the House of Lords (and by five judges to four overall) and the case is notable for the divergent views taken by the judges on various points.

The case turned on the question whether the premises, a purpose-built shop with a flat above in a parade of similar premises, came within the definition of a 'house' in s 2(1) of the Leasehold Reform Act 1967 as including 'any building designed or adapted for living in and reasonably so called, notwithstanding that the building . . . was or is not solely designed or adapted for living in'. The most significant earlier decision is *Lake v Bennett* [1970] 1 All ER 457 where the Court of Appeal unanimously held that a building which comprised a basement, a ground floor and two floors above was a house 'reasonably so called'. There the basement and two upper floors were occupied for ordinary living purposes but the ground floor was sub-let for use as a licensed betting office. It was undisputed that it had previously been a house in a terrace of dwelling-houses.

The photographs of the premises together with the descriptions, in *Lake v Bennett* and *Tandon's* case respectively seem to have created very different impressions on the different judges. In the Court of Appeal Griffiths LJ, with whom Watkins LJ agreed, were led to the conclusion that the two sets of premises were 'of a markedly different character', and in the House of Lords, Lord Fraser said that the contrast was obvious from the photographs. The same evidence, however, made Ormrod LJ think it would be bizarre for a different decision to be reached in one case than the other.

Another matter on which there were different opinions expressed was the relevance of Part II of the Landlord and Tenant Act 1954. Griffiths LJ stated that he had borne in mind that business tenants had protection under that Act, and Lord Wilberforce agreed that it was proper to take this into account. Lord Roskill, however, with whose speech Lords Scarman and Bridge concurred, expressed his clear opinion that this was an irrelevant consideration and the fact that the tenant might have protection as a business tenant under the 1954 Act was no reason for construing the 1967 Act in such a way as to exclude him from the benefits of that Act.

Both Lord Wilberforce and Lord Roskill talk about achieving a balance between landlord and tenant, though Lord Wilberforce would seem to lean in favour of the landlord because the Act favours the tenant and detracts from the landlord's common law rights, while Lord Roskill seems to lean in favour of the tenant because he says, Parliament intended the Act to confer its benefits on, inter alia, terrace shops with living accommodation over. With respect, this is not the sort of question which involves a balancing act: it is not like deciding whether the tenant or landlord will suffer greater hardship if a possession order is or is not granted; or where the balance of convenience lies in an application for an interlocutory injunction. The question is whether the building is a house reasonably so-called, and this is a mixed question of law and fact. As a question of law the court sets the parameters of what is meant

by a house reasonably so-called, and as a question of fact the judge has to decide whether the circumstances of the case fall within those parameters. The majority in the Court of Appeal accepted, of course, that it is for the judge of first instance to find the primary facts, but held that on appeal the court is free to apply its own views as to whether the building falls within the meaning of a 'house' as used in the Act: Ormrod LJ, however, seems to have treated the question of fact as covering a much wider area. Lords Wilberforce and Fraser took a similar view to the majority in the Court of Appeal, but the majority in the House of Lords confined the question of fact to an even narrower area. Probably all the Law Lords would agree with Lord Roskill's first two propositions: (1) as long as a building of mixed use can reasonably be called a house, it is within the statutory meaning of 'house' even though it may also reasonably be called something else; (2) it is a question of law whether it is reasonable to call a building a 'house'. Presumably the dissenting Law Lords would not however accept the third proposition that if the building is designed or adapted for living in, only exceptional circumstances (which Lord Roskill found it hard to envisage) would justify a judge in holding that it could not reasonably be called a house. They would have to be such that nobody could reasonably call the building a house. Lords Wilberforce and Fraser, dissenting, thought there was no evidence to show that the building was reasonably called a house and would doubtless have agreed with the majority in the Court of Appeal that it was not even a borderline case.

Despite the differences in opinion we now seem to have in the majority decision what is said to be a rule of law, as laid down in Lord Roskill's three propositions, which have the practical result that it will be only in very unusual circumstances that a tenant who occupies the building as a residence will be unable to claim that it is a 'house . . . reasonably so-called'.

Postscript

An appeal from the decision in *Torminster Properties Ltd v Green* was dismissed by the Court of Appeal, as reported in (1983) Times, 21 March.

Police

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Entry, search and seizure without warrant following arrest

A person has been arrested by the police and removed to the police station. Can the police subsequently enter the premises where the arrest took place in order to seize an instrument used by the arrested person to commit the offence? There is no statutory power to do so. A warrant cannot be obtained (unless the weapon happens to be stolen property). But what about the common law? This question faced the Divisional Court in *McLorie v Oxford* [1982] 3 All ER 480.

It was first pointed out by Donaldson LJ, giving the court's reserved judgment, that the case was in fact about search, since the right of seizure is comprised within the right of search, even where the police know the precise location of the article.

It was argued for the police that at common law there was a right to seize the instrument used by an arrested criminal in the perpetration of a serious crime of violence when the whereabouts of the instrument were known. The perpetrator of a serious crime of violence may be arrested and entry may be effected for that purpose; and a weapon found at the time may be seized. The absence from our law of any provision authorising the issue of a warrant to seize a weapon in these circumstances was itself evidence that no warrant was needed because the seizure was permitted at common law. If, for example, two police officers entered the house after the suspect and one officer arrested him, the other could seize the weapon. It would make no sense to say that, if the suspect had been pursued into the house by only one officer, who arrested him, that officer could not immediately thereafter return to seize the weapon which circumstances had prevented him from taking earlier.

The court thought that the four situations listed in *Swales v Cox* [1981] 1 All ER 1115, DC, were the only ones in which the common law permitted an entry to effect an arrest without warrant. Those situations were (i) to prevent murder, (ii) if a felony had been committed and the felon followed to a house, (iii) if a felony was about to be committed and would be committed unless prevented, and (iv) if an offender was running away from an affray.

The court referred to the well-known seizure cases of *Chic Fashions (West Wales) Ltd v Jones* [1968] 1 All ER 229, CA, and *Ghani v Jones* [1969] 3 All ER 1700, CA, but it was pointed out that neither had anything to do with rights of entry. (It is also interesting to note Donaldson LJ's comment that the dictum about seizing evidence in *Ghani v Jones*, although binding on the court, might at some stage be considered by the House of Lords as to its correctness.) There was, however, the dictum of Lord Widgery CJ in *Jeffrey v Black* [1978] 1 All ER 555, 558, DC, to the effect that the police might be entitled to search the home of a person arrested elsewhere if the search was connected with the offence for which he had been arrested, but no authority for this was given and it was not necessary to the decision in the case, so it did not, in Donaldson LJ's view, advance the matter any further.

Two other well-known authorities, in the court's opinion, pointed away from the submissions made on behalf of the police. *Davis v Lisle* [1936] 2 All ER 213, DC, held that the police had no right to question a suspect on private premises and were obliged to withdraw when told to do so; and *R v Waterfield* [1963] 3 All ER 659, CA, held that the police could not at common law detain a car as evidence when the car was in a public place and the owner had not been arrested. It is not in fact apparent why these cases were thought to controvert the police contention. Neither deals with the case of an arrested person; and it is the fact of arrest which is said to make all the difference. Moreover, *Waterfield* was doubted in *Ghani v Jones* and is certainly not compatible with it.

The argument against the police view was said to be 'brief but powerful'. First, it is not credible that such a power could have existed for centuries with no trace of it appearing in the books. Secondly, despite the flexibility of the common law, the power sought could only be properly introduced by Parliament.

The police could, said the court, have followed the suspect to his house in 'hot pursuit' and entered it and they could then have seized any weapon or instrument, which would have been in the suspect's possession, or they could for good reason have seized it notionally, telling the occupier or householder that they would return as soon as possible to remove it, when they could enter by force if necessary. But they could not return later to seize that which was not there at the time of the arrest or was not to their knowledge there. 'Such is the importance attached by the common law to the relative inviolability of a dwelling house,' said Donaldson LJ (at p 485),

> 'that we cannot believe that there is a common law right without warrant to enter one either in order to search for instruments of crime, even of serious crime, or in order to seize such an instrument which is known to be there. Certainly if there were, we would expect it to be reflected in the books and it is not.'

To bring about such a result by the evolution of the common law would constitute a violent change, added Donaldson LJ, and the court could not accept it.

This decision makes it clear, therefore, that, even assuming *Ghani v Jones* (above) is correct, that case permits seizure only where the entry and search (if there has been one) are themselves lawful, since seizure follows from the search; and even if the criteria for seizure in *Ghani v Jones* are met, that confers no right of entry or search.

The court thought there might be a good case for permitting a magistrate to issue a warrant in these circumstances, but that was a matter for Parliament. In fact, cl 11 of the Police and Criminal Evidence Bill which lapsed on the dissolution of Parliament in May 1983 would have allowed a constable to enter and search any premises occupied or controlled by a person who has been arrested for an arrestable offence, if he had reasonable grounds for believing that there was evidence on the premises relating to that offence. Only if the search was to take place after the arrested person had been taken to a police station was the constable required to obtain authorisation from an officer of the rank of inspector or above. Where the arrested person did not occupy or control the premises, an application for a search warrant would have had to be made to a magistrate under cl 9.

Summary arrest and reasonable belief

Section 28 of the Town Police Clauses Act 1847 reads:

> 'Every person who in any street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall be liable to a penalty . . . and . . . any constable shall take into custody, without warrant, and forthwith convey before a justice, any person who within his view commits any such offence; (that is to say,) . . .
>
> Every person who publicly . . . uses any profane or obscene language.'

The crucial words are 'any person who within his view commits any such offence'. What if the person was arrested by the constable who reasonably believed the person to be guilty of the offence, but the person was ultimately acquitted? Is the arrest lawful? In *Wills v Bowley* [1982] 2 All ER 654, HL, the appellant had been acquitted of using obscene language since there were no passers-by who could have been annoyed, but she was convicted of assaulting the three constables who arrested her. Her argument was that, since she had not committed the offence, her arrest was unlawful, and as the police officers were acting unlawfully and therefore not in the execution of their duty, she was entitled to resist arrest and could use reasonable force in doing so. Her convictions for assaulting the constables in the execution of their duty were therefore unsound. The apparently straightforward question before the House nevertheless divided the committee three to two and gave rise to a majority speech running to 12 pages and two lengthy dissenting speeches.

Lord Bridge, with whom Lords Wilberforce and Russell agreed, pointed out that using obscene language was one of 30 offences in s 28, some of which were serious and some quite trivial. It was also the constable's *duty* to arrest, neglect of which was punishable under the 1847 Act until its repeal by the Police Act 1964. The words 'within his view' meant 'in his sight' and not 'in his opinion', so that if reasonable belief did suffice, it would have to be a belief based wholly on his own observation. Section 28 of the 1847 Act is one of a number of statutory provisions, mostly nineteenth century, allowing arrest of a person who has committed an offence without words referring to a reasonable belief finding explicit expression. Lord Bridge reviewed some nine decisions, most of which lent support to the view that actual guilt was not required, but none of which was binding on the House, and in the end it fell to be determined on principle and policy.

Parliament, thought Lord Bridge, intended that persons actually committing the offence should be arrested and thereby made amenable to the course of justice, but the person making the arrest cannot know of the person's guilt until a court subsequently determines it and if the police officer is to have any protection—both against civil action and violent resistance—it must lie in his honest and reasonable belief that the person has committed the offence. This was especially so when there was a duty to arrest, since to hold otherwise would pose a choice for the police officer between running the risk of making an unlawful arrest and the risk of committing the offence of neglect of duty. An honest and reasonable belief was required, and 'thinking that the man was probably guilty', which had been Lord Denning's test (*Wiltshire v Barrett* [1965] 2 All ER 271, 275), put it too low, since it substituted suspicion for belief.

It would make very little sense for Parliament to confer a power (let alone a duty) which could be exercised honestly and reasonably yet still at the risk that it might prove unlawful, although admittedly such a provision is to be found in the general power of arrest under s 2(3) of the Criminal Law Act 1967 which, preserving the common law distinction, makes an arrest by an ordinary person on reasonable suspicion that the person arrested has committed an arrestable offence lawful only if that offence has in fact been committed (albeit by someone else); and Lord Lowry made much of this in his dissenting speech. Why that requirement ever commended itself to the judges is a mystery; why it received statutory expression in 1967 is a greater mystery and why it was to be continued in the now lapsed Police and Criminal Evidence Bill (cl 16(7)) defies all explanation. At least the House of Lords have resisted the temptation to extend it to other statutory provisions on arrest and their rejection of a literal interpretation, even at the cost of favouring the powers of the police at the expense of the liberty of the individual, is welcome.

Lord Elwyn-Jones, dissenting, took as the guiding principle the fact that, where the liberty of the subject was concerned, the court should not go beyond the natural construction of the statute and the strict terms of the grant of the power to arrest without warrant. He would permit arrest on an honest belief—he omits reasonable, but this is presumably unintended—as opposed to requiring that the person arrested has in fact committed the offence, only where it is honestly believed that prompt action is called for in the interests of public safety or where danger to life, limb or property is threatened. This is a not untenable distinction in principle if one is reluctant to extend police powers of arrest in regard to trivial offences, but it is difficult to see how the courts as a matter of construction can distinguish the two types of offence when the legislature has employed the same form of words, and when in s 28 of the 1847 Act both serious and trivial matters sit side by side in the same section. Lord Lowry in his dissent sought to draw no such distinction.

Lord Lowry's rejection of the majority's wider interpretation was based on what he regarded as the fallacy on which that view rested. A police officer, reasons Lord Lowry, if he *believes* that a person has committed an offence within his view, *will* make an arrest and the wide interpretation is not necessary to encourage him to do so. If he is sufficiently cautious or self-regarding to refrain from arresting the supposed offender on the ground that his belief may subsequently be held by a court to have been incorrect, he is just as likely to refrain on the ground that a court may hold that his belief was not *reasonable*.

This reasoning is difficult to follow. The wide interpretation is not primarily predicated on the fallacy Lord Lowry identifies, that the policeman may hesitate to arrest, but on two other factors: first, that it may give rise to violent resistance by the suspected offender who is of the view that he has not committed the offence; and secondly, as Lord Lowry recognises, that, if that indeed proves to be the case, the police officer or chief constable will be liable in damages notwithstanding the officer's honest and reasonable conduct. It is not improper to ask whether Parliament can possibly have intended such a result. The impact which these two dominant factors may have on the police officer's inclination to arrest in a particular case may also be relevant, especially in regard to forcible resistance, to which Lord Lowry makes no

reference. Moreover, there is a wide and significant difference between having confidence that one's belief that an offence has been committed is reasonable and recognising that the person's guilt may not be established by a court. Lord Lowry wrongly assumes that a constable troubled in the latter situation would be equally troubled in the former, since he might doubt whether a court would judge the reasonableness of his action as he did. It should be added, though, that Lord Lowry's speech is a powerful and cogent argument, and one which gives due weight to the liberty of the individual as a value to be preserved, and it shows clearly that legislative rationalisation of the problem is the only answer, ensuring that the power of summary arrest is available only where it was truly necessary. Clause 17 of the lapsed Police and Criminal Evidence Bill would have provided an answer, for it would for the first time have given a general power of arrest in respect of non-arrestable offences where a constable reasonably suspected that any offence had been committed or attempted or was being committed or attempted and the constable could not ascertain the person's name and address or the arrest was reasonably necessary to prevent the person causing physical harm to himself or any other person, loss of or damage to property, an affront to public decency, or an obstruction of the highway. Even if one is critical of some of these so-called 'general arrest conditions', at least the basis of it is rational and the legality of an arrest would not be unpredictable and contingent.

Reading words into a statute, particularly when it limits individual liberty and strengthens the hands of the police, is a hazardous and dubious activity. Policy and common sense dictated that course in this case, but Lords Elwyn-Jones and Lowry rightly point out the perils involved and their speeches should stand as reminders that a cautious use of the practice in the future is imperative. Those who support the decision in *Wills v Bowley* may indeed live to regret its implications for future cases.

Obstruction of the police

If you tell someone in the course of committing an offence that a policeman is coming, so that he suspends his activities and thereby escapes detection, you commit the offence of obstructing a police constable in the execution of his duty, contrary to s 51(3) of the Police Act 1964. But is the offence also committed if you tell someone who is not committing an offence at the time but is minded to do so later that the police will be observing him at that time and in consequence he postpones its commission? In *Green v Moore* [1982] 1 All ER 428, DC, Green, a probationer constable, informed the licensee of a hotel bar, who habitually permitted drinking after hours, that police officers would be on duty later that night to check on his activities, and as a result he adhered to the licensing hours.

Two principles conflicted, observed Donaldson LJ, delivering the court's reserved judgment. The prevention of crime is to be encouraged; yet it is illegal to obstruct the police in the execution of their duty. The probationer constable had been convicted by the magistrates but on appeal the Crown Court held, first, that an obstruction took place only if at the time a person is committing or has committed an offence, and secondly, that the investigating officers were not 'in the execution of their duty' at the time the alleged obstruction took place.

In *Bastable v Little* [1907] 1 KB 59, DC, the defendant was acquitted of obstruction for warning oncoming drivers of a police speed trap on the ground that there was no evidence that those drivers were in fact exceeding the speed limit, whereas in *Betts v Stevens* [1910] 1 KB 1, DC, the defendant was convicted because the cars were exceeding the limit and the speed trap was intended only to obtain confirmatory evidence of the fact. The judges drew a distinction between the person who intended to prevent the commission of a crime and the person who intended merely to prevent its commission until the danger of detection passed.

But Donaldson LJ was unhappy with *Bastable v Little*—'a very curious decision based on a highly eccentric view of the facts' (p 432)—since it would have been more realistic to suppose that the motorists, even if not then exceeding the limit, were likely to do so when in the trap, but that possibility had not been considered by the court. The court in *Green v Moore* could see no distinction between a warning given in order that the commission of a crime may be *suspended* until the danger of detection had passed and one given so that the commission of a crime may be *postponed* until the danger had passed. Confining *Bastable v Little* strictly to its facts, both actions in the court's view amounted to the offence under s 51(3).

Three questions had to be asked in connection with this offence (see *Rice v Connolly* [1966] 2 All ER 649, 651, per Lord Parker CJ). Was there any obstruction of a constable? On the facts here, there clearly was. Were the constables acting lawfully in the execution of their duty? The Crown Court judge came to the perverse view that they were not, but that was manifestly wrong. Was the obstruction intended to obstruct the constables in the execution of their duty? Again, the court answered affirmatively, since it was the probationer constable's intention to assist the landlord and not the police.

The Divisional Court allowed the appeal and refused leave to appeal to the House of Lords, although certifying that a point of law of general public importance was involved. The House of Lords also refused leave. The case was remitted to the Crown Court, which after further hearing found that Green did not know for certain that the police would visit the bar, that he warned the licensee so that he would not be caught breaking the laws, and that he did not intend to obstruct the police. Because of this last finding, Green's appeal was successful and his conviction quashed. The prosecutor again appealed to the Divisional Court (*Moore v Green* [1983] 1 All ER 663), which allowed the appeal and remitted the case to the Crown Court to enter a conviction. Green had intended that the licensee should not be caught by the police breaking the licensing laws; he was not at all concerned that the law should be obeyed; and that was an obstruction. It was immaterial that he was unaware that this amounted to an obstruction or that he evinced no hostility to the police (see further *Hills v Ellis* [1983] 1 All ER 667, DC).

The answer to the question posed in the first paragraph—is the offence of obstruction committed if you tell someone planning to commit an offence later that he will be under police observation so that he does not commit the offence at that time?—is that it is if the warning is given with the intention that that person should merely postpone the crime until he can get away with it. It is not apparently committed if the intention behind it is to prevent a crime at all. Sound though this appears in principle, it does increase the practical difficulties and makes it not a little hazardous for an individual to

promote compliance with the law in certain circumstances. It will be far from easy in some cases for a court to ascertain the objective or intention of the person giving the warning, and it will be confusing if, whatever the accused's intention, the person warned is obviously going to break the law as soon as it is safe for him to do so. Is that a consideration the accused must bear in mind? More certainty would admittedly be obtained if obstruction were limited to physical obstruction, as it apparently is in Scotland (see Leopold, [1982] PL 558, 562), but this would be purchased at the cost of legitimizing conduct which plainly impedes the police in the proper discharge of their duties.

Freezing bank accounts pending trial

The law empowers a criminal court on convicting an offender to make various financial orders in connection with his criminal activities. But it can take a long time for an offender to be convicted. Meanwhile, he may draw on his funds, which may be the fruits of the crime, and dissipate his assets. Can he be stopped from doing this in anticipation of a conviction? In *Chief Constable of Kent v V* [1982] 3 All ER 36, CA (Civil Division), this is precisely what the chief constable tried to do.

V faced charges of forgery and obtaining money by deception on forged instruments by stealing several cheque books, forging the owner's signature and withdrawing £16,000 which he paid into two accounts of his own, where the money became intermingled with moneys belonging to others, also possibly obtained by deception. To prevent the money belonging to the owner of the stolen cheque books being lost, the police sought an injunction to restrain V from withdrawing any money from his bank accounts and the bank from handling any transactions in respect of the accounts.

Parliament having failed to provide explicitly for such a situation, the application was made in the light of s 37(1) of the Supreme Court Act 1981 under which the High Court may grant an injunction, whether interlocutory or final, 'in all cases in which it appears to the court to be just and convenient to do so'. The court reserved judgment but differences of opinion, even between the two majority judges, abound.

Lord Denning MR in characteristic fashion identified where the justice of the case lay and argued forcefully in support of the order sought by the police, though he conceded that the books were silent on the subject. If one applied the principles relating to the seizure of goods believed to be stolen, the power to freeze a bank account followed logically and inevitably, whether the money had been stolen or obtained by fraud. If a thief put stolen banknotes in a left luggage office, the police could seize them; why should they be powerless merely because he had paid them into a bank account? Since the fusion of law and equity, the common law could lift the latch of the banker's door, walk in and examine the books. There were, said Lord Denning, timorous souls who were fearful of this extension and who denied that the police had any right to such an injunction (one such, Slade LJ, was sitting right beside him). Any impediment to the grant of an injunction had now been removed by statute. Hitherto, only an interlocutory injunction could be granted where it appeared just and convenient to do so, presupposing the existence of an action, actual or potential, claiming substantive relief; but s 37 of the 1981 Act (above) now provides that such an order may be interlocutory

or final. The result of this change, in Lord Denning's view, is that an injunction need no longer be ancillary to an action claiming a legal or equitable right: s 37 conferred a new and extensive jurisdiction on the High Court and there was no reason why the courts should cut it down by reference to previous technical distinctions. The power to grant an injunction was unlimited, subject only to the applicant's having a sufficient interest in the matter to give him standing. It was a chief constable's duty to do his best to recover stolen or unlawfully obtained goods and discover and apprehend the thief and he had a corresponding right, or interest, on behalf of the public to seize and detain the goods pending the offender's trial. In pursuance of that right and duty, he can apply for an injunction. The chief constable did therefore have *locus standi*.

Lord Denning then sought to apply the principles he had delineated to a bank account. If a thief deposited a suitcase full of stolen bank notes, belonging to people not yet ascertained, with his bank, he could demand its return at any time. The police could, however, obtain an injunction to stop the bank delivering it to him, just as they could obtain a search warrant from a magistrate. That must also be so if he has paid the money into his bank account. Such an injunction is vital as an ancillary support to an order for restitution under s 28 of the Theft Act 1968. It would make a mockery of the law if the thief could evade a restitution order by disposing of the goods pending his trial, or frustrate a compensation order in like manner. *Malone v Comr of Police of the Metropolis* [1979] 1 All ER 256, CA, which seemed to contradict Lord Denning's view, would he thought be decided differently today in view of s 37 of the Supreme Court Act; it was also distinguishable.

These principles also applied where the thief stole, not money, but goods, which he then sold, putting the cash into his own bank account. If the proceeds of stolen goods can be traced into the account, the police can obtain an injunction to prevent their disposal, so that they can be restored to the owner of the goods, who rightly becomes a secured creditor. There is also no problem even if the proceeds are mixed with his own moneys in the account. Lord Denning therefore was for granting the injunction, though V could apply for leave to withdraw sums he might need for his defence or other purposes.

Though agreeing that the police should have their injunction, Donaldson LJ parted company from Lord Denning on many points of principle. First and foremost, he was quite unable to see how, even with the wide language of s 37(1) of the Supreme Court Act 1981, the court could regard it as just and convenient to grant an injunction except in the enforcement of a legal or equitable right or interest: 'Were it otherwise, every judge would need to be issued with a portable palm tree' (p 42). Did the chief constable, then, have such a right or interest? Any cause of action had to arise out of the chief constable's rights or duties as such, which had never been exhaustively defined. However, they included a duty to use his best endeavours to detect crime, bring criminals to justice, recover stolen property and restore it to the rightful owner. Hence, the common law has invested constables with powers which include a right to seize goods reasonably believed to be stolen. Has the common law conferred a similar right in relation to intangibles?

The first time the point arose was in *West Mercia Constabulary v Wagener* [1981] 3 All ER 379, where an injunction did freeze a bank account on the

application of the police, rightly, as Donaldson LJ thought (though not for the reasons given by the judge; see Feldman, (1982) 98 LQR 190). In *Chic Fashions (West Wales) Ltd v Jones* [1968] 1 All ER 229, CA, the common law invested the police with the right to seize goods believed to be stolen; and this could be enforced by mandatory injunction if necessary. Likewise, the common law invested the police with a right to 'detain' moneys standing to the credit of a bank account if it has been criminally obtained. Otherwise, the simple expedient of banking the money would immunise it from seizure. Donaldson LJ refused to be drawn on whether this extended also, as Lord Denning thought it did, to the case where the criminal sold stolen property and banked the proceeds. Donaldson LJ also disagreed with Lord Denning over the correctness of *Malone*. In his view, there was no power to freeze a defendant's account, or, as in *Malone*, to detain cash, in respect of which no charges were alleged, in order to satisfy a possible restitution, compensation or forfeiture order.

The injunction sought by the police against V should be confined to moneys in the accounts which were traceable as coming from the defrauded owner's accounts; the entire account should not therefore be frozen; and the police should issue a writ claiming a declaration as to their right to detain the moneys, so that the injunction would in effect be ancillary to that action. Those proceedings would of course be postponed until after the criminal proceedings against V.

Slade LJ was unable to accept even Donaldson LJ's more modest conclusions. No authority, he asserted, had been cited which suggested that the chief constable had been invested by statute or common law with any special right or *locus standi* to seek relief by way of injunction as a protector of the public interest (as the Attorney-General and local authorities had been). He did, however, agree with several of Donaldson LJ's observations and premises, disagreeing only when it came to the conclusion that by issuing a writ the chief constable would be asserting a sufficient claim to a legal or equitable right. What, asked Slade LJ, would be the precise nature of the right that would result from such an extension of the *Chic Fashions* principle? It would have to be shown that, where a chief constable reasonably believed that moneys standing to the credit of a bank account were traceable to property that had been criminally obtained from another, he had a present or contingent legal or equitable right to demand that such moneys be actually paid over to him. Only if that proposition were supportable could the injunction be properly granted, and Slade LJ saw insuperable obstacles in so extending *Chic Fashions*, which was materially different.

The present case concerned intangible property in the form of choses in action which were enforceable only by legal proceedings; there was no question of obtaining the moneys in the accounts as material evidence at the trial; and eventual restoration to the true owner would be rather different from the return of tangible stolen goods envisaged in *Chic Fashions*. In fact, the chief constable was merely anxious to ensure that any compensation order that might be made could be met.

Slade LJ was doubtful whether it was in the public interest to give the police a right to intervene in cases of intangible property like the present. The police would be required to take proceedings in a number of cases if this were allowed, many of them more complex and difficult than the present. It

remained open to the injured party to seek an order for the preservation of any choses in action in which he could show a prima facie legal or equitable interest. Both the defrauded owner of the cheque books and her bankers could probably make such an application in the present case. If the police thought that injunctive relief in these circumstances should be open to them, they should seek such powers from Parliament and not from the courts.

Despite the beguiling simplicity and apparently inexorable logic and common sense of Lord Denning's judgment, Donaldson LJ's approach is much to be preferred of the two. Nevertheless, it represents a notable piece of judicial law-making in questionable circumstances. Even discounting Lord Denning's wider (if not wilder) propositions, this case leaves the law in a highly uncertain and unsatisfactory state (see Yeats, [1982] PL 553). It is far from clear that even Donaldson LJ's judgment would attract the support of the House of Lords. There are technical and indeed policy difficulties, as Slade LJ emphasises. Its scope is uncertain. While one has sympathy with the object sought by the police and acceded to by the court, and even an admiration for the robust logic that applies well-settled principles to novel situations and ignores merely technical distinctions between tangible and intangible property, this is just the kind of problem that demands careful consideration by a law reform agency before its acceptance. Its ramifications are likely to be many and unpredictable. The police would be well advised to tread cautiously; and the Government should lose no time in initiating a thorough review. Legislation is certain to be the only answer.

Practice and Procedure

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Introduction

The subject matter of practice and procedure extends over a very wide field and encompasses, as a glance at the White Book would quickly reveal, a multitude of jurisdictional matters, procedural devices, numerous remedies and many other topics. By the laws of probability one would have expected that reported cases in a given year would range over a fairly large number of disparate points. But this is not in fact the case. The reports are clustered around a comparatively very small number of topics. Two topics figure prominently: the newly developed Mareva jurisdiction, and Anton Piller orders and other matters of discovery. It is not, perhaps, a coincidence that these matters should come uppermost in the concern of the courts. Civil procedure has lost much of its rigidity, litigants are given considerable latitude, errors and omissions are curable at the discretion of the judge or master and the pulling off of a technical victory is much rarer. The result is that it has become less likely for litigants to wage great legal battles on technical issues. At the same time, whether for economic, social or moral reasons, signs have begun to show that the effectiveness of the jurisdiction of the courts was being somewhat undermined. There are two major ways of undermining an otherwise efficient procedure of adjudication: denying it the evidence which it requires as raw material for its process or removing the assets from which its judgments could be satisfied. To deal with these matters the courts have developed two new procedures—the Anton Piller order (as well as improving other aspects of discovery) and the Mareva injunction. A good deal of this review will therefore be devoted to these.

Mareva injunctions

As the Mareva jurisdiction is still rapidly developing, when a case comes before the Court of Appeal the court often goes beyond determining the actual issues in dispute and provides guidelines for future conduct. Such cases require, therefore, a somewhat detailed consideration. This is particularly true of *Z Ltd v A* [1982] 1 All ER 556. The plaintiff, a foreign company, was defrauded of some £2m by a number of persons operating from England. Some of the money was paid into English banks and some was used to buy goods and property. Z Ltd obtained a Mareva injunction against the participants in the fraud and against various innocent third parties, including the five major clearing banks, into whose hands the proceeds or other property came, restraining them from dealing with the assets. This was followed by writs for damages against 17 defendants, orders for specific discovery against the third parties and various Anton Piller orders. As a result the plaintiffs recovered a good deal of their losses, but the action was kept alive at the

request of the banks so that the court may clarify the law and lay down general guidelines concerning the position of third parties who are affected by Mareva injunctions. The Court of Appeal seized the opportunity with alacrity, but the usefulness of its teaching is somewhat diminished by the fact that the court did not speak with one voice and by the differences of opinion on a number of important points. One cannot help feeling therefore that Lord Hailsham may, after all, have been right in doubting the wisdom of judges performing the functions of the rules committee while adjudicating individual disputes (*The Siskina* [1977] 3 All ER 803, at 839).

Let us begin by setting out the points on which there was accord. It was generally agreed that s 37(3) of the Supreme Court Act 1981 has confirmed the courts' jurisdiction to grant interlocutory injunctions to restrain a party from dissipating, or dealing with, assets within the jurisdiction of the court as well as from removing assets out of the jurisdiction. Thus the position of a plaintiff suing an English defendant is finally recognised to be the same as that of a plaintiff suing a foreign defendant. It was then held that a Mareva injunction, once granted, had an immediate effect on every asset of the defendant to which it was directed; that it was a method of attachment operating in rem, similar to an arrest of a ship. It therefore results in revoking any authority or instructions that the third party may have received from the defendant concerning dealings in the assets. In the case of orders concerning bank accounts this means that the bank's obligation toward the defendant to honour the latter's cheques is revoked and the bank must refuse payment on presentation. It would, however, be more accurate to speak of suspension of the bank's authority rather than its revocation, for the Mareva injunction is an interlocutory order and is liable to be discharged or modified, whether by agreement of the parties or otherwise. Since the injunction operates immediately against the assets, the third party is bound to comply with it as soon as he has notice, irrespective of whether the defendant has notice of it himself. Notice on the third party, according to Lord Denning MR ([1982] 1 All ER at 563), may be given informally, eg by telephone or by telex, though it is desirable that it should be soon followed by a copy of the order itself. It would also be desirable, it is submitted, that such informal notices be binding on third parties only if given by solicitors, so as to maintain some safeguards against abuse. The reasons for which only solicitors may execute Anton Piller orders apply, *mutatis mutandis*, here too.

As for third parties' liability for contempt of court, Eveleigh LJ's judgment is particularly instructive. He held, and the court was at one on this, that there could be no breach of the injunction, and therefore no contempt, without knowledge of the order. He emphasised that mens rea was essential and that even carelessness or negligence would not suffice, because of the strong criminal element of the offence and the fact that it involves an interference with the course of justice (at 568–569). The third party's liability, Eveleigh LJ explained, could either be independent or take the form of aiding and abetting another (particularly the defendant) to break the order. In the former case there is no need to prove that the defendant knew of the order, it is enough that the third party did an act inconsistent with the order and with knowledge of its terms (at 566–567). A corporation, usually a bank, will be vicariously liable for contempt, according to Eveleigh LJ, when 'a servant acting in the course of his employment knowingly assists in the breach the

terms of the injunction' (at 569). And as far as the corporation's notice was concerned

> 'it should be necessary to show that the person to whom notice was given authorised the payment or, knowing that payment was likely to be made under a general authority derived from him, deliberately refrained from taking any steps to prevent it' (at 569).

For a further discussion of this aspect of the case, see the article on Contempt of Court.

Having clarified the position on these matters the court went on to provide guidance for applicants in seeking Mareva injunctions and to judges in granting them. First and foremost, if the injunction affects third parties the plaintiff should be required to give an undertaking to indemnify the third party against any liability and to pay expenses reasonably incurred by banks and other third parties in complying with the order. Expenses for a bank may arise, for instance, from the need to ascertain in which of its branches the defendant keeps accounts or from the circulation of notices to its branches. The court was informed that a 'full trawl' by the major banks may cost about £2,000. However, Lord Denning MR thought that an undertaking may not be insisted upon when the plaintiff is legally assisted (at 566). This last view is in line with *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502, but it is not free of difficulty. If the third party incurs expenses these presumably could be met from legal aid funds. But suppose that the third party suffers losses. Should a third party who has been accidentally drawn into the litigation be exposed to the risk of loss without compensation?

Secondly, the plaintiff should inform the court of the names of banks or other third parties to whom it is proposed to give notice of the injunction—though according to Lord Denning MR a plaintiff should not be precluded from giving notice to other third parties if fresh information comes to light ([1982] 1 All ER at 564). As we have seen, on receiving such notice any act by a third party calculated to assist the defendant to infringe the order could amount to contempt. One therefore doubts whether it is desirable that, without any specific authority from the court, the plaintiff should be in the position of imposing obligations on third parties, unless the order is issued in respect of specific and identifiable assets.

Thirdly, the plaintiff should, as far as possible, identify the assets in respect of which the injunction is sought and should provide the fullest available information concerning this location and value.

Fourthly, the application should be supported not only by affidavits dealing with the factual side but also by

> 'a full draft order for consideration by the judge, ie, one which contains all the undertakings on the part of the plaintiff... and which gives effect to the appropriate injunction in terms which are adapted to the particular circumstances of the case' (at 574, per Kerr LJ).

So far so good, but difficulties begin to emerge when their Lordships come to deal with matters that touch upon the balance of convenience or, to put it differently, the balance of evils. For an injunction ordering the freezing of a bank account has, as we have seen, drastic legal effects and could have equally severe consequences in practice. An injunction amounts to an immediate order to the bank not only to prevent the defendant from drawing his funds

but also to dishonour his cheques and bills. By depriving a defendant of his working capital the injunction may result in serious loss to his business, and although the plaintiff will have given an undertaking to indemnify the defendant against losses, it is by no means clear that all losses could be recovered. Furthermore, the bank has to dishonour the defendant's cheques even if they were made before the order, or before the defendant knew of the order. This could hurt the defendant's creditors who were paid by cheque before the order for goods supplied or services rendered. It should be noted here that the plaintiff's usual undertaking to indemnify does not extend to such third parties (for discussion of these effects see Mustill J's judgment in *Third Chandris Shipping Corpn v Unimarine* [1979] 2 All ER 972 at 978).

In *Z Ltd v A* the court discussed a number of measures to protect both a third party on whom the order was served and the defendant from adverse consequences. To begin with, it considered the desirability of making 'maximum amount' orders, that is, orders freezing the defendant's assets only up to the amount of the claim, thus allowing him to use his capital to the extent that it exceeds that amount. However, as Lord Denning MR pointed out,

> 'that is all very well so far as the defendant is concerned, because he knows, or should know, the value of his assets. But it is completely unworkable as far as the bank or other innocent third party is concerned, because it does not know what other assets the defendant may have or their value ([1982] 1 All ER at 565).

He therefore thought that 'the best course may be to omit the maximum amount altogether', at least as far as third parties are concerned (ibid). Eveleigh LJ considered that maximum amount orders could place banks in a difficult dilemma. If the bank refuses to honour the defendant's payment, it runs the risk of being in breach of duty should the defendant's instruction be consistent with the injunction, on account of the defendant possessing other assets, possibly in other banks. On the other hand, if, the bank having paid on the defendant's order, it turns out that the payment exceeded the amount in the injunction, the bank runs the risk of being in contempt (at 570). Although this dilemma is somewhat ameliorated by Eveleigh LJ's view that contempt is committed only where there is full guilty knowledge and not merely carelessness or recklessness, the difficulty for the bank remains. But Kerr LJ thought that it was in principle unjustified to make an order freezing the defendant's assets generally and 'that the norm should be the "maximum sum" order' (at 575). For the purpose of overcoming the practical difficulties adverted to by his brethren he proposed that orders should be drafted

> 'in such terms that any third party on which it is served is only obliged to freeze whatever assets of the defendant it may hold up to the maximum sum specified in the order' (ibid).

He realised that this may still involve duplication and freezing too much, but he regarded the outcome fairer than a freeze on all the defendant's assets.

To minimise the hardship of ex parte Mareva injunctions generally, including such as may arise from a comprehensive freezing order, Lord Denning MR thought that 'the court may sometimes think it right only to grant it [the injunction] for a few days until the defendant and the bank or other innocent third party can be heard' (at 565). That is, that the initial order should fix a 'return day'. But Kerr LJ considered return dates un-

desirable, firstly, because they would 'tend to lessen the degree of thought which should be given to ensuring . . . that the appropriate order is made on the ex parte application'; and, secondly, because return dates would clutter up the courts (at 574).

Their lordships then considered what payments may be exempted from an order freezing the defendant's assets, whether or not it is a maximum sum order. It was thought that it may be desirable to allow the defendant to have the use for 'normal living expenses' up to certain specified sums, but that the bank should not be required to enquire what use is to be made of the sums drawn (at 565 per Lord Denning MR). It was not made clear whether this is to be done at the ex parte stage or later on after hearing, but in any case such allowances may in practice prove difficult (cf *A J Bekhor & Co Ltd v Bilton* [1981] 2 All ER 565).

It was generally accepted that a Mareva injunction should not prevent a bank from making payments out of the defendant's account which the bank is duty bound to make as a result of an undertaking by the bank towards a third party; eg payments under irrevocable letters of credit or bank guarantees. A common instance of such an obligation arises from cheque card or credit card transactions, whereby the bank undertakes towards third parties to honour credit given to the customer when it is given against such cards. Lord Denning MR thought that the bank should honour liabilities incurred with bank cards 'except when they have been used fraudulently or wrongly' ([1982] 1 All ER at 563). As the bank will be duty bound to honour the card whether or not the customers used it properly, it is difficult to see why the bank should not be allowed to debit the defendant's account in all cases, unless of course the bank was in collusion with the defendant or it failed to take reasonable steps to withdraw the card after the court's order. Unfortunately, Kerr LJ, who also considered this point, stopped short of expressing a view as to what the bank's rights would be if the defendant continued to use the card after the bank had taken the necessary steps to withdraw it (at 577).

A certain amount of indeterminacy also remains in relation to the proper scope of Mareva injunctions concerning assets other than accounts held by banks. Lord Denning MR thought that an order should apply to 'any specific asset held by the bank for safe custody on behalf of the defendant, be it jewellery, stamps, or anything else' (at 563). Kerr LJ, however, was of the view that orders should not apply to shares or title deeds which the bank may hold as security, or to articles in a safe deposit which the bank may hold in the name of the defendant,

> 'unless these are either specifically referred to in the order, because they are in some way connected with the subject matter of the action . . . The reason is that the bank may not, and generally will not, know their precise value . . .' (at 576).

The point seemed to have remained suspended as Eveleigh LJ agreed, in general, with both his brethren. The same is also true of the applicability of injunctions to joint bank accounts, to which the injunctions should normally apply according to Lord Denning MR (at 565), but not according to Kerr LJ (at 576). The opinion of the latter was that an order should not usually apply to

> 'assets of the defendant which may come within the control of the bank subsequent to the date on which a copy of the order is served on the Bank, and after its ascertainment of the assets of the defendant which it then holds' (at 577).

But it would appear that *Third Chandris Shipping Corpn v Unimarine* [1979] 2 All ER 972 supports a different view.

These uncertainties could be attributed to two courses. First, to the difficulty of formulating general guidelines capable of achieving a satisfactory balance between the conflicting interests of plaintiffs and defendants. This is to some extent inevitable, and in any event a discretion always remains exercisable in individual cases and departure from, or addition to, the guidelines would often go a long way towards achieving a proper balance in the particular circumstances before the court. Yet to exercise discretion, judges have to have some idea not only regarding the general purpose of Mareva injunctions, but also about the relative importance of the respective interests of plaintiffs, defendants and innocent third parties, and how their relative weights can change in certain types of circumstances. However, and this is the second cause of uncertainty, the subject is still in its infancy and matured principles are still to develop, though a few tentative suggestions may perhaps already be made.

We may start by distinguishing between measures which are justified only as a matter of necessity and urgency, and measures which would be justified even apart from urgency. Suppose that the Mareva injunction prevents the bank from honouring a cheque which the defendant had given to a supplier of goods supplied. If the supplier (or indeed the defendant) then applies to the court to have the order discharged in respect of that cheque, there can be little doubt that the court would accede to the application. For by resisting the application the plaintiff would be seeking 'to obtain security in advance for any judgment which he may obtain', in the words of Kerr LJ in *Z Ltd v A* ([1982] 1 All ER at 571), which is not allowed. It is for a similar reason that banks may charge to the defendant's blocked account payments made by the bank to third parties in respect of liabilities undertaken by the defendant on the strength of credit or cheque cards. When an order is made ex parte it may not be desirable to exempt from its application payments in respect of cheques made before the order for fear, as Kerr LJ put it, that the defendant may predate his cheques after the order (at 577). At the same time, the fact that a third party, like our supplier, may later apply to have the order discharged does not mean that third party interests may be altogether ignored at the ex parte stage. When a cheque is returned to the supplier he may not know for some time the reason for this. Furthermore, third parties are not always willing or able to take legal proceedings and, even if they do and succeed in getting the order discharged, they may be left with no compensation for losses they may have suffered through the delay. The supplier will certainly have no claim against the defendant who paid him by cheque, and it is doubtful that he would have recourse against the plaintiff since the latter undertakes indemnity only towards third parties on whom the order is served. Before subjecting third parties to such inconveniences and risks some special justification must be shown. There are situations where any such hardship to innocent third parties and, indeed, to the defendant, is clearly outweighed by the strength of the plaintiff's claim. This will happen where

the plaintiff could establish a legal interest in the very assets to which the injunction is to apply. This situation is demonstrated most clearly where the plaintiff's claim is that the defendant converted his money and placed it into his bank account, or appropriated some other property belonging to the plaintiff or, as was the case *CBS UK Ltd v Lambert* [1982] 3 All ER 237, the defendant invested money obtained from infringing the plaintiff's rights in ascertainable assets. Hence whenever directly or by virtue of the doctrine of tracing, the plaintiff asserts a right in the assets themselves, he should be entitled to an ex parte order, provided of course that all other relevant requirements are fulfilled. Such a plaintiff does not merely claim a money judgment against the defendant, he also insists on a right to be satisfied from the very assets to which the injunction is to apply, in precedence to other creditors. *Z Ltd v A* was precisely such a case. The defendants obtained by fraud money from the plaintiffs and placed it in bank accounts or bought property with it. The plaintiffs had clearly a right to the money and to property which represented the fruits of the fraud. However, cases of this kind have been few (though see also *Prince Abdul Rahman v Abu Taha* [1981] 3 All ER 409).

Usually the plaintiff has only a claim to money judgment and no right to be considered a secured creditor or to be given precedence over other creditors. This was the situation in *Galaxia Maritime SA v Mineralimportexport* [1982] 1 All ER 796 which came before the Court of Appeal soon after *Z Ltd v A*. The plaintiffs, a Swiss corporation, had a claim against the defendants, a Romanian trading corporation, for demurrage. The plaintiffs discovered that the defendants were the owners of a cargo of coal which was on board a ship, belonging to an innocent third party, about to sail from the port of Barry. The plaintiffs obtained an injunction restraining the ship from sailing and were prepared to undertake to compensate the port authority and the third party shipowner against losses and expenses. The shipowner applied for discharge of the injunction pointing out that if it was not lifted forthwith the ship would not be able to sail until before Christmas with the result that the crew's holiday arrangments, as well as the shipowner's trading activities, would be seriously disrupted. The Court of Appeal was unanimous in holding that the interference with the shipowner and his crew was wholly unjustified and that the injunction should be lifted. Eveleigh LJ said that the plaintiffs' guarantee against losses notwithstanding—

> 'A third party is entitled to freedom of action and he is entitled to trade freely. I do not think that the plaintiff has the right to a "compulsory purchase" of the rights of a third party and that is what it amounts to in this case' (at 799).

Kerr LJ expressed himself more strongly:

> 'To allow the plaintiff to serve a Mareva injunction on a shipowner in relation to a cargo which is owned . . . by the defendant . . . in order to seek to prevent the ship from sailing out of the jurisdiction with the cargo, appears to me to be a clear abuse of this jurisdiction because it involves an unwarrantable act of interference with the business of the third party . . .' (at 799).

A previous case where an injunction was granted in similar circumstances, *Clipper Maritime Co v Mineralimportexport* [1981] 3 All ER 664, was distinguished on the ground that there the ship was on time charter to the defendant so that the financial consequences of the delay fell principally on

him, whereas here the case was on a voyage charter. There was also the further difference that in the former case the shipowners did not object. Nonetheless, the present case clearly casts doubt on *Clipper Maritime*, for the Court of Appeal not only discharged the injunction, but also implied that it should not have been granted in the first place. As we have already seen, Kerr LJ considered the application an abuse, and Sir George Baker on his part was 'appalled by the ramifications of the granting of a Mareva injunction in the circumstances of this case . . .' ([1982] 1 All ER at 800). While this decision does not directly affect the question of a Mareva order preventing a bank from honouring cheques given by the defendant prior to the injunction, it does indicate a willingness to take into consideration the rights of third parties. As Kerr LJ put it:

> 'Where the effect of service of the injunction on a third party substantially interferes with the third party's business, the rights of the third party must in my view always prevail over the desire of the plaintiff to secure the ultimate recovery of debts or damages from the defendant with which the third party is in no way concerned' (at 800).

When a Mareva injunction is likely to affect the rights of third parties a further consideration, it is submitted, should be pertinent: the extent to which the plaintiff had taken a risk in entering into the transaction from which his claim arises. If he could be said to have voluntarily taken a speculative risk, then he should not be entitled—generally speaking—to turn to the court to safeguard him from adverse consequence of such risk. In *Z Ltd v A* Kerr LJ gave an example of such a situation: a person is requested to make an unlawful payment, he makes it and thereupon obtains a Mareva injunction ex parte in order to freeze the sum paid over. Kerr LJ considered this an abuse and said:

> 'If a person is willing to make such a payment, appreciating the implications, the courts should not assist him to safeguard the payment in advance by means of a Mareva injunction' ([1982] 1 All ER at 572).

But this reasoning should be extended further and apply to commercial transactions as well. Take the facts of the *Galaxia Maritime* case. If the plaintiffs, a foreign corporation, chose to charter their ship to the Romanian state corporation without—apparently—obtaining any security for payment, they should not be entitled to an injunction interfering with third parties' (or even the defendant's) business merely because the charterparty named English law as the law of the contract. We may again quote Kerr LJ in *Z Ltd v A*:

> '. . . the great value of this jurisdiction should not be debased by allowing it to become something which is invoked simply to obtain security for a judgment in advance, and still less as a means of pressurising defendants into settlements' ([1982] 1 All ER at 572).

By contrast, greater consideration and help should be extended to a plaintiff who has undertaken no commerical risk, as, for instance, one claiming in respect of personal injury. A comparison between *Allen v Jambo Holdings* [1980] 2 All ER 502, on the one hand and, on the other, *Rasu Maritima v Perambangan* [1977] 3 All ER 324 lends some support to this view. However, when a case involves an element of fraud, the help which plaintiffs

can obtain from the court is of course far greater, everything else being equal. Here *CBS UK Ltd v Lambert* [1982] 3 All ER 237 provides a striking example. There were strong reasons for believing that the defendant had been pirating the plaintiff's music cassettes on a large scale, causing them enormous financial damage. There was also evidence that, in order to make himself immune from judgment, the defendant was investing money earned from his illegal activities in the purchase of expensive cars, while at the same time claiming to be unemployed and receiving social security payments. The Court of Appeal granted a Mareva order ordering the defendant to disclose the full value of his assets, refrain from removing them out of the jurisdiction and requiring him to deliver up the cars in his possession. Lawton LJ relied on s 37(3) of the Supreme Court Act 1981 which provides—

> 'The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled or resident or present within that jurisdiction.'

And he held that;

> 'The words "dealing with" are wide enough to include disposing of, selling, pledging or charging; and there are no limitations put on the word "assets", from which it follows that the word includes chattels such as motor vessels, objets d'art and other valuables as choses in action. The only restriction there is on the making of a Mareva injunction is that it must appear to the court to be just and convenient to do so' ([1982] 3 All ER at 241).

It was also affirmed that the court had power to order discovery in aid of Mareva injunctions, though it was not thought necessary to determine whether the power derived from s 37(i) of the 1981 Act or from inherent jurisdiction (a point on which the court in *Bekhoz v Bilton* [1981] 2 All ER 565 was divided). The court also took this opportunity to lay down guidelines for the making of orders for the delivery up of chattels, which are broadly as follows:

(a) there must be clear evidence that the defendant is likely to dispose of the property to defeat judgment and the the property was acquired by him as a result of the alleged wrongdoing.
(b) The order should not apply to the defendant's clothes, furnishings, tools of his trade, or any machinery, materials and goods used by him for his lawful business—unless the objects were clearly bought to defeat judgment.
(c) Orders should clearly specify the chattels to be delivered up.
(d) Orders must not authorise plaintiffs to enter the defendant's premises and seize his property except by the plaintiff's permission.
(e) Delivery should be ordered to be made only to the plaintiff's solicitor or to a receiver appointed by the court.

In conclusion, recent cases on the Mareva jurisdiction demonstrate both the extent to which courts are prepared to help plaintiffs who assert rights in specific assets or show fraud and the restraint exercised when these elements are missing. (For the availability of the jurisdiction at the request of a person who does not seek substantial relief see: *Chief Constable of Kent v V* [1982] 3 All ER 36, discussed by Professor Zellick in the article on Police.)

Anton Piller orders

Recent developments in the Anton Piller jurisdiction are concerned with the limiting effect which the privilege against self incrimination may have on the exercise of the jurisdiction. Discussion of this matter has to commence with *Rank Film Distributors v Video Information Centre* [1981] 2 All ER 76 where the House of Lords held that the court must not make ex parte orders compelling a defendant to disclose information, provide documents or answer interrogatories where compliance with the order would expose the defendant to the danger of being prosecuted for a serious criminal offence. This created 'a strange paradox' in the words of Lord Wilberforce in the same case since

> 'the worse, ie the more criminal, their activities [the defendants'] can be made to appear, the less effective is the civil remedy that can be granted . . .' ([1981] 2 All ER at 79).

Parliament swiftly acceded to the House of Lords' prompting to remove the paradox and enacted s 72 of the Supreme Court Act 1981 which provides in sub-s (1):

> 'In any civil proceedings to which this subsection applies a person shall not be excused, by reason that to do so would tend to expose that person, or his or her spouse, to proceedings for a related offence or for the recovery of a related penalty
> (a) from answering any question put to that person in the first-mentioned proceedings; or
> (b) from complying with any order made in those proceedings.'

Subsections (3) and (4) make evidence obtained under this section inadmissible in criminal proceedings for related offences against the defendant, save where such proceedings are for perjury or contempt of court. Unfortunately the scope of s 72 is limited to civil proceedings in the High Court for infringement of intellectual property, such as patents, trade marks and copyright or for passing off (s 72(2)).

This limitation was acutely felt in *Khan v Khan* [1982] 2 All ER 60. The plaintiff claimed that he gave a blank signed cheque to the defendant for the purpose of paying for property to be purchased for the plaintiff, that the defendant made out the cheque for £40,000, and paid it into the bank account of his own company from where the money was soon removed. On discovering this, the plaintiff obtained ex parte a tracing order requiring the defendant to swear an affidavit disclosing the whereabouts and application of the £40,000. The defendant applied to have the order set aside on the ground that answers in compliance with the order would tend to incriminate him of offences under the Theft Act 1968 and the Forgery Act 1913. Woolf J refused the application and the defendant appealed to the Court of Appeal. The argument there revolved around the interpretation of s 31(1) of the Theft Act 1968 which removes the privilege from 'answering any question . . . in proceedings for the recovery . . . of any property . . . or for an account of any property or dealings with property,' but only in so far as such answers may incriminate 'of an offence under this Act.' The section correspondingly makes answers and evidence obtained under it inadmissible 'in proceedings for an offence under this Act.' The defendant argued that since answers could expose him to liability for forgery, which was not an offence under the Theft

Act, he could still assert his privilege; especially in view of the fact that incriminating answers made by him would be admissible in proceedings for forgery, which in the circumstances were likely to be launched. Dismissing the defendant's argument and the appeal Stephenson LJ held that proceedings for theft and forgery jointly 'would . . . still be proceedings for an offence under the Theft Act.' For, as he put it,

> 'It would be monstrous if the assistance given by s 31 to persons seeking to recover their stolen property could be defeated by the bare possibility of an alternative offence under some other Act, or at common law, being introduced into the criminal proceedings.' ([1982] 2 All ER at 65).

Trying to allay the defendant's fears that the evidence could still be used against him in proceedings for forgery, Stephenson LJ said

> '. . . although this court cannot control the discretion of a prosecutor or the Crown Court, I think it would be monstrous also if the prosecution were to resort to what Lord Wilberforce in *Rank Film Distributors v Video Information Centre* [1981] 2 All ER 76 at 80 described as "a contrived addition to other charges" for the purpose of defeating the protection given to a defendant by the section and introducing otherwise inadmissible evidence.' ([1982] 2 All ER at 65).

Kerr and Griffiths LJJ concurred on this point, the latter adding that it was 'extremely unlikely' that a prosecution against the defendant would also include a count for forgery; a confidence which seems somehow misplaced in view of the course taken by the police in *Chief Constable of Kent v V* [1982] 3 All ER 36 (see p 205 above). Griffiths LJ also thought that forgery was merely the technical means by which the defendant perpetuated the theft and it was 'inconceivable that a judge would impose any additional sentence for the count of forgery to that which he imposed for the count of theft,' and he saw 'no useful purpose to be served by including the count of forgery in an indictment' (at 66). This reasoning seems, however, to ignore the fact that the elements of theft and forgery are very different. There is no need, for instance, to prove intention permanently to deprive the owner under a charge for forgery, though it is an element in theft.

More problematic still is the alternative ground on which the Court of Appeal rejected the defendant's claim of privilege. It decided that, in any event, compliance with the tracing order would not expose the defendant to, or materially increase, the risk of criminal prosecution, since in the circumstances the defendant was already exposed to such a risk arising, as it did, from his handling of the plaintiff's cheque. Furthermore, Griffiths LJ explained

> '. . . I am quite unable to see how the question of what happens to the money after it had been admittedly paid by the . . . defendant into his company's account has any bearing on his guilt of either theft or forgery. The guilt or innocence of the first defendant depends on the circumstances in which he paid the money to his company . . . and not on what happened to the money thereafter' (at 66).

We should distinguish here between two separate questions. First, the extent to which the defendant's answers would increase the probability that he would be prosecuted. And, second, given that he would be prosecuted, the extent to which his answers would help the prosecution. It is true that the absence of the risk of prosecution removes the privilege. But the converse is

by no means true; it is not the case that when prosecution is certain the privilege is removed. Were it otherwise a person would not be able to assert the privilege while being tried for the offence in question, or in other proceedings while a charge for the offence was pending. Yet Stephenson LJ seems to suggest the contrary (at 66). Let us now take the second question. 'Does the defendant's answer increase the risk of a conviction?' An affirmative answer suggests self-incrimination. But, again, the converse does not necessarily follow. Suppose that the police are already in possession of circumstantial evidence which strongly proves the defendant's guilt of an offence. It still, it is submitted, does not follow that the defendant loses his privilege against self-incrimination. Of course, this is not what Griffith LJ implied here. He simply thought that the information concerning the whereabouts and application of the money was irrelevant to the proof of theft. But this can hardly be the case, since subsequent dealing with stolen property may, and often does, throw light on the accused's state of mind; especially in circumstances such as the present, where the defendant claimed that he obtained the money innocently, as a loan from the plaintiff. Yet none of this criticism goes to undermine the wisdom and desirability of the court's approach which, it may be suggested, indicates a willingness to curtail the privilege against self-incrimination as much as possible especially where it constitutes an obstacle to the recovery of property by the victim of fraud (for further discussion of the privilege see the article on Evidence).

The privilege against self-incrimination was asserted in a somewhat different way, but with as little success in *Emanuel v Emanuel* [1982] 2 All ER 342. In divorce proceedings between the parties the husband persistently ignored or evaded various orders made by the court requiring him to make discovery and supply information concerning his assets. There was evidence that he breached an order forbidding him to dispose of his assets and that he failed to comply with orders to make lump sum and periodic payments. And, in addition, there was evidence suggesting that the husband committed perjury in the proceedings. Against this background the wife applied ex parte for an Anton Piller order authorising her solicitors to enter the husband's premises and to locate and remove evidence concerning his financial position, including material related to recent dispositions. As the husband was 'clearly ready to flaunt the authority of this court and to mislead it if he thinks that it is to his advantage so to do,' Wood J, in the Family Division, considered it a proper case for the issue of the order (at 348). But he was concerned lest the documents seized from the husband proved that he committed perjury in the proceedings. He referred to *Rank Film Distributors v Video Information Centre* [1981] 2 All ER 76 but regarded it, on the strength of *Rice v Gordon* (1843) 13 Sim 580, as inapplicable to the present circumstances. In the latter case it was held that the privilege against self-incrimination cannot be invoked in respect of perjury committed in the very proceedings in which the claim is made, for otherwise the court would

> 'be holding out an inducement to a defendant to commit perjury in an early stage of the course, in order to prevent the court from administering justice in this suit' (ibid).

Consequently, Wood J made an order which authorised the seizure of documents even if they disclosed perjury. This reasoning has certainly a lot to

commend itself and is further strengthened by the fact that when the privilege is removed by s 72 of the Supreme Court Act 1981, although the section provides that evidence obtained under the section shall not be admissible in criminal proceedings against the defendant, it explicitly goes on to lay down that the evidence so obtained will be admissible in proceedings for perjury or contempt of court. The same is also true under s 31 of the Theft Act 1968.

A contrary view, however, was expressed, obiter, by Griffiths LJ in *Bekhor v Bilton* [1981] 2 All ER 565, 582 where he said:

> 'If I thought that this order for discovery was made merely to provide the material for contempt proceedings I would not hesitate to set it aside; it would clearly be an improper exercise of the power and offend against the principle that a man cannot be required to incriminate himself.'

One cannot distinguish this dictum on the ground that it deals with contempt rather than with perjury. Both offences have a strong element of interference with the course of justice and the same rules should apply to both, as is indicated by s 72 of the Supreme Court Act 1981. Nor could one distinguish the dictum on the ground that it deals only with orders made solely for the purpose of obtaining evidence of contempt, since Griffiths LJ went on to say that while a question tending to reveal contempt may be put in interrogatories served for a wider purpose, the defendant could still object to answer on the ground that the answer would incriminate him (at 582). Ackner LJ seemed to share this view (see pp 579–580) and Stephenson possibly did so too (at 587). Yet Ackner and Stephenson LJJ were also of the opinion that it would have been perfectly proper to order cross-examination of the defendant on his affidavits, under RSC Ord 38, r 2(3), in order to ascertain whether he had breached any of the court's orders; citing *Comet Products v Hawex Plastics* [1971] 1 All ER 1141 to the same effect. It seems, therefore, fairly safe to assume that Wood J's decision in *Emanuel v Emanuel* was right, at least in so far as ordering the disclosure of information, otherwise necessary for deciding the issues in the case, notwithstanding that answers or documents could reveal that the defendant had committed perjury at an earlier stage in the same proceedings.

Lastly, it should be noted that the privilege against self-incrimination can be claimed only in respect of answers which the party making the claim is asked to give, or documents containing admissions. It does not extend to otherwise incriminating material. In the *Rank Film Distributors* case the House of Lords approved of the part of the Anton Piller order requiring the defendants to give up illicit copy films. Similarly, it is suggested that the privilege should not apply to documents which merely record transactions, such as conveyance and business accounts.

We have seen that the present state in the growth of the Mareva injunction is partly occupied with the development of safeguards against abuse. The same is also true of the Anton Piller jurisdiction, the main purpose of which is to prevent interference with, or destruction of, evidence. It seems that some practitioners began to regard the procedure as a means for discovering evidence upon which to found a subsequent claim. In *Hytrac Conveyors v Conveyors International* [1982] 3 All ER 415, an interlocutory appeal, the Court of Appeal set out to put an end to such practice. The plaintiff company issued, on 30 April, a writ against a number of defendants, consisting of past

or present employees, claiming injunctions restraining them from infringing the plaintiff's industrial copyright. On the same day the plaintiff executed an Anton Piller order permitting the plaintiff to search the defendants' premises and seize documents and goods. On 11 May the defendants gave notice of intention to defend, but the plaintiff, instead of delivering a statement of claim within 14 days as required by RSC Ord 18, r 1, applied to the High Court for interlocutory injunctions pending trial. An extensive exchange of affidavits then followed. On 22 July the defendants applied under Ord 19, r 1 for the action to be dismissed for inordinate delay, no statement of claim having yet been served. The judge dismissed the action and the plaintiff appealed, asking for an extension of time to serve the statement of claim and giving as reason for the delay the need to analyse the large quantities of documents obtained from, and affidavits made by, the defendants, who for their part had little idea of what was alleged against them.

In upholding the judge's dismissal of the claim Lawton LJ gave a stern warning against the course adopted by the plaintiff, when he said:

> 'If the idea is getting around that, as a result of service of a notice of motion asking for an interlocutor injunction, no statement of claim should be delivered, then the sooner that idea is dissipated the better, because often it is essential for the purposes of seeing whether an interlocutory injunction should be granted that the court should know what is the nature of the allegations which the plaintiff is making' (at 417).

And on the practice of using Anton Piller orders as a means to obtain discovery he observed:

> 'It is to be remembered by all concerned that we do not have in this country an inquisitorial procedure for civil litigation. Our procedure is accusatorial. Those who make charges must state right at the beginning what they are and what facts they are based on. They must not use the Anton Piller orders as a means of finding out what sort of charges they can make' (at 418).

Discovery

The seeking of discovery before serving a statement of claim received further discouragement from the Court of Appeal in *RHM Foods Ltd v Bovril Ltd* [1982] 1 All ER 673. While affirming the jurisdiction under RSC Ord 24 to make an order for discovery before pleading, the court decided that the discretion to make such orders should be exercised only in exceptional circumstances. Normally, the court held, discovery before pleading should not be ordered where the plaintiff's object is merely to substantiate his suspicions and help him obtain interlocutory relief. Furthermore, until issues were joined in the pleadings the court would rarely be in a position to know whether discovery related to 'matters in question in the action', within Ord 24, r 1(1), and whether discovery was 'necessary . . . for disposing fairly of the cause or matter' within Ord 24, r 8. For discovery to be justified at an early stage, the court implied, the applicant must normally show that there is a danger that evidence will disappear or be tampered with.

An important case on the periphery of discovery is *Home Office v Harman* [1982] 1 All ER 532. It is discussed by Professor Miller in the article on Contempt of Court and it is, therefore, unnecessary to reiterate the facts or

the arguments, except to say that it involved the commission of Miss Harman, a solicitor, for contempt arising from her disclosure to a journalist of documents which were obtained in discovery proceedings and which were subsequently read out in open court. Since, as Professor Miller explains, the problems in the case are difficult to solve and may not have been finally put to rest, it may be useful to make some general comments on the broader arguments canvassed in the House of Lords.

Lord Scarman, speaking for the minority consisting of himself and Lord Simon, saw the issue as one requiring a balance to be struck between, on the one hand, the protection of the litigant's privacy (notwithstanding his duty to disclose documents in discovery) and, on the other, the protection of the right to information and the protection of the right of free speech. This dichotomy is somewhat problematic. It is doubtful that our law recognises a right to information which is distinct from the right to free speech. Even in the United States of America the right of access to information is of recent legislative birth and does not seem to be embedded in the constitution. In England, one only has to consider the widespread practices of government departments, and other public bodies, to shield their internal activities from the public gaze to realise just how little information, let alone a right to it, the public has.

These practices are supported by Draconian Official Secrets Acts and further bolstered by the courts in their willingness to recognise new, and expand old, grounds of public interest immunity.

No doubt it is desirable that the public should be better informed about matters which are of general public concern, for just as open trial is a bulwark of justice (as is emphasised by all their Lordships in the *Harman* case), so could open government become a catalyst towards efficiency, fairness and freedom. But this is hardly pertinent to the issue under consideration, for open government cannot, and should not, be achieved through tinkering with discovery in legal proceedings. Besides, a good deal of litigation is conducted by private citizens or bodies and it cannot be said that there is a general public interest of being informed about the affairs of private litigants. It could perhaps be said that what is put forward here is a right to be informed about legal proceedings conducted in open court. But it is doubtful whether such a right can be derived from the fundamental principle of open trial, for one would have to argue that a person has a right to be informed about such proceedings even when he did not avail himself of the opportunity of attending them. However, it is clear that one does not have a right, supported by someone else's corresponding duty, to access to the mechanical recording of proceedings or to a transcript thereof, or to the judge's notes, or to the parties' files even when they consist exclusively of material and argument debated in open court. One has, of course, a right to report them, the latter being a corollary of the right of free speech which is more pertinent to the present issue and to which we must now turn.

Attention, it is suggested, should be focused not so much on the abstract right of free speech but on the object in respect of which it is being asserted: documents disclosed by a party in discovery proceedings. Two propositions are accepted by all: first, that a party obtaining discovery and his legal representatives are not entitled to divulge these documents, except in court,

merely because they were produced on discovery. In other words, a party obtaining discovery is under an obligation to refrain from using information imparted in discovery for any collateral or ulterior purpose. What is accepted here is, therefore, that a party's right to keep the documents to himself and not reveal them to the world is not waived or terminated or swept away by the fact that he has had to reveal the documents to his opponent.

Secondly, it is agreed that there is a right to report that which passed in open court.

The minority in *Harman* was of the opinion that once documents obtained in discovery were read out in open court they have somehow become public domain and the party who obtained them may now deal with them as he pleases. This view, it is submitted, cannot be supported merely by appeal to freedom of speech, for, as we have just seen, the parties cannot speak freely about their opponents' documents, let alone circulate them, merely because they were obtained on discovery. Whether the minority is right must depend on, and only on, the empirical or practical question: granted that the documents have been read out in open court, and given that the proceedings may be freely reported, would the termination of the obligation to refrain from publishing documents obtained in discovery further increase the damage to the privacy of the party who produced the documents? The majority thought that the answer was clearly in the affirmative, and for this reason decided that a solicitor's undertaking not to take advantage of his possessions of copies of documents obtained in discovery 'does not terminate as respect each individual document at the very moment that that document . . . is actually read out in court' (at 539 per Lord Diplock).

Practical considerations are, it is submitted, strongly on the side of the majority. Moreover, a strict duty on parties and their solicitors not to divulge documents obtained in discovery is likely to contribute to greater willingness to disclose relevant documents in discovery proceedings. The majority emphasised the adverse effects which the minority's view could have on the frankness of private litigants, but of equal importance is the adverse effect which the minority's view could have on the willingness of government and other public bodies to forgo the only too frequent appeal to public interest immunity. Miss Harman's action has been taken by many as vindication of the government policy to withhold documents concerned with government activities even when they are relevant to pending proceedings. There is every indication that the courts too are more than willing to be swayed by this view (see *Air Canada v Secretary of State for Trade* [1983] 1 All ER 161, 180). In an adversarial system effective mutual discovery depends on the trust that the parties (and their solicitors) may place in each other. No rules of practice requiring full discovery, however much supported by legal sanctions, can be truly effective in the absence of mutual trust. It is not too much a price to pay for sustaining trust to hold that a solicitor is not free to do that which everybody else may do; especially since in some respects this is already the case as, for instance, when we accept that a solicitor containues to be bound by professional duty of confidence even when the content of the communication between him and his client has become generally known. A solicitor's duty to respect the privacy of the opponent should be, at least, as strict as the duty which he owes to his own client.

Summary judgment (including further evidence on appeal)

It seems to have been assumed in recent years that on appeal from a summary judgment to the Court of Appeal, the latter had an unfettered discretion to receive further evidence. This assumption has been put paid to by the House of Lords in *Langdale v Danby* [1982] 3 All ER 129. In a succinct speech Lord Bridge, speaking for the whole House in reversing the Court of Appeal's decision, explained the application of RSC Ord 59, r 10(2) which provides:

> 'The Court of Appeal shall have power to receive further evidence on questions of fact . . . but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.'

Summary judgments may be given under RSC Ord 14 or Ord 86. Here judgment had been given under the latter, and the issue was whether such judgment amounted to 'an appeal from a judgment after trial or hearing of any cause or matter on the merits'. Since Ord 86, r 4 says that at the hearing of an application under Ord 86 'the Court may give judgment for the plaintiff in the action', there is clearly 'an appeal from a judgment' here. While Lord Bridge accepted that a summary judgment was not given 'after trial', he held that it was clearly given 'after [the] hearing of any cause', since

> '"Cause", by definition includes an action, and since a summary judgment for the plaintiff under Ord 86, r 4, disposes of the action it can only result from a hearing of an action' (at 137).

His Lordship further held that the hearing under Ord 86 was 'on the merits' for—

> 'What the judge must do before he gives judgment for the plaintiff under r 4 is to be satisfied that the merits of the plaintiff's claim are duly verified as required by r 2 and, more importantly, that the defendant has failed to mount a sufficient challenge to those merits on the law or on the facts to show that there is any issue or question in dispute which ought to be tried' (at 137).

The conclusion reached by the House was, therefore, that Ord 59, r 10(2) excluded further evidence on appeal from a summary judgment to the Court of Appeal, except where special grounds for the admission of such evidence existed. It was also held that the general test for 'special grounds' applied here too and that, in accordance with the *Ladd v Marshall* [1954] 3 All ER 745 at 748, the party seeking to adduce further evidence must show:

1. 'that the evidence could not have been obtained with reasonable diligence for use at the trial';
2. that the evidence 'would probably have an important influence on the result of the case'; and that
3. the evidence is 'apparently credible'.

Lord Bridge pointed out that these conditions may have to be somewhat modified when applied to appeals from summary judgments. For example, under condition (2) it would only be required that the evidence raises a triable issue. Similarly, a lower standard of diligence may be expected from parties to such proceedings. This is a most welcome decision since the practice of allowing defendants to turn up with new evidence and new arguments on

appeal could well have robbed the summary judgment procedure of much of its advantage. In the instant case the plaintiff obtained summary judgment in December 1979 and the defendant appealed after time and introduced further evidence at the hearing of the appeal a year later. As Lord Bridge put it

> '... it would be a great injustice to the plaintiff to allow the defendant to introduce for the first time on appeal evidence which was readily available at the hearing of the summons but was not produced' ([1982] 3 All ER at 138).

Two further points should be noted. First, it was argued for the defendant that the plaintiff had waived his right to object to the further evidence since he had filed affidavits in reply to the defendant's affidavits and since he had not objected to the further evidence at the first opportunity, ie when it was put before the court on the defendant's application for extension of time. The argument was rejected, the House holding that it was only prudent of the plaintiff to answer the further evidence in case his objection to admissibility failed, and that it was not too late to object to the evidence of the hearing of the appeal because 'the Court of Appeal would clearly have considered the further evidence de bene esse before deciding on its admissibility' (at 135).

Second, another issue was whether the defendant should be allowed to go back on admissions made on his behalf by counsel before the judge. Here, again, the House struck a welcome note for the finality of judgment. It held that as the plaintiff was permitted to obtain summary judgment on the arguments presented by the defendant and as the former spent two years and a great deal of money in enforcing the judgment, the plaintiff acted to his detriment and the defendant was estopped from going back on his admissions.

The summary judgment procedure often requires a delicate balance to be struck between the plaintiff's interests and those of the defendant, and the resulting outcome may not only be that neither of the parties is fully satisfied but also that logic is only partially heeded. *M V Yorke Motors v Edwards* [1982] 1 All ER 1024 provides an illustration. The defendant sold to the plaintiff a car which the former had no right to sell and which was repossessed by a finance company, whereupon the plaintiff issued a summons for summary judgment under Ord 14, r 1, claiming £23,250. In an affidavit the defendant put forward a defence about which the judge had grave doubts; but he thought it raised a triable issue. He gave leave to defend on condition that the defendant paid £12,000 into court, notwithstanding that the defendant had been granted a legal aid certificate with nil contribution. In so doing the judge indicated that the certificate was not inconsistent with the defendant owning a house of considerable value. The defendant appealed to the Court of Appeal before which he swore an affidavit that he owned no house, was unemployed and that there was no likelihood of him being able to raise any such sum. On the basis of this further evidence the Court of Appeal reduced the sum to £3,000, it also being of the opinion that the defendant's defence was 'shadowy' and entertaining doubts about its bona fides. The defendant appealed to the House of Lords which also took the view that the defendant's chance of succeeding on his defence was 'extremely remote'.

The principles applicable in the exercise of the discretion to impose conditions on leave to defend were not really in dispute and Lord Diplock, speaking for the House, accepted that they were as follows. First, it was

wrong to lay down as a condition the payment of a sum which the defendant would never be able to pay, since that would amount to giving judgment for the plaintiff notwithstanding that in the court's view there was an issue which ought to be tried. Secondly, a defendant cannot complain merely because a financial condition is difficult to meet. Thirdly, where a defendant seeks to avoid or limit a financial condition by reason of his impecuniosity, the onus is on him to put sufficient and proper evidence before the court, making full and frank disclosure. And, lastly, the fact that the defendant is legally aided with a nil contribution is not sufficient evidence that he cannot pay a substantial sum.

The only issue in the case was whether the defendant could pay £3,000. Brandon LJ in the Court of Appeal was of the view that:

> 'The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need' (at 1028).

Referring to this conclusion Lord Diplock said—

> 'I can see no reason why the Court of Appeal should be entitled to infer that, although it might be difficult, it would not be impossible for Mr Edwards [the defendant] to find security if his defence were put forward in good faith.'

However, surprising as it may sound, Lord Diplock immediately went on to say

> 'nor do I see any ground on which this House could interfere with the way in which the Court of Appeal exercises the discretion (which had devolved on it in consequence of the additional evidence which had not been before the judge) by fixing £3,000 as the appropriate amount of security' (at 1028).

It is not easy to reconcile these two passages, nor is it easy to reconcile the conclusion with the principle that the condition must not be such as the defendant would be quite unable to fulfil. On the other hand, the resulting dismissal of the defendant's appeal was perfectly justifiable in view of the great weakness and tenuousness of his defence. It may therefore be concluded that, in practice, the imposition of an impossible condition is permissible when the defence itself is, if not wholly impossible, at any rate next to impossible.

Orders 'by consent' and extension of time

Parties to civil proceedings have almost unlimited freedom to, as it were, contract out of the rules of practice; after all they may sidestep the courts altogether by reference to arbitration or by compromise. If they bring their dispute to court but then wish to change the rules, they must do so by clear and unambiguous agreement. This emerges from *Siebe Gorman & Co v Pneupac Ltd* [1982] 1 All ER 377 where in the course of interlocutory proceedings the defendants obtained an order for discovery of documents 'by consent' of the plaintiffs. The draft order, which was prepared by the defendant applicants, stated that in default of compliance the plaintiffs' claim would be struck out. Meeting genuine difficulties in complying with the order in time the plaintiffs applied, on the last day for compliance, for an extension of time.

The day after the defendants applied for the claim to be struck out and the judge acceded in view of the terms of the 'consent order'. On appeal by the plaintiffs the defendant's argument was that the consent order represented a contract and that the court had no choice but to enforce it, as it would any other valid contract. In rejecting this the Court of Appeal warned practitioners to beware of the ambiguity of the words 'by consent'. The expression could indicate a contract or merely that the parties did not object to the making of the order. It was held that the present case was of the latter type. And it was further held that even if the order had represented a contract the jurisdiction of the court under RSC Ord 3, r 5(1) to 'extend the period within which a person is required . . . to do an act', would still not have been ousted for the contract would have been interpreted as having been made subject to the rules of the court, including Ord 3, r 5(1). According to such an interpretation an application for extension of time would not amount to breach. If the parties wish to exclude the jurisdiction under Ord 3, the court held, they must do so in clear and unambiguous terms.

Another case dealing with the jurisdiction to extend time is *Robert Baxendale Ltd v Davstone (Holdings) Ltd* [1982] 3 All ER 496. It also contains a warning to solicitors, though of a very different kind. It is discussed by Professor Pettit in the article on Landlord and Tenant, above.

Mention must also be made here of *Bernstein v Jackson* [1982] 2 All ER 806. The plaintiff issued a writ but he was unable to serve it and the twelve months period of its validity expired. He failed to apply for renewal of the writ under RSC Ord 6, r 8, but two years later he obtained leave to serve the writ by substituted service, and subsequently obtained judgment in default of appearance. The Court of Appeal decided that the general jurisdiction, under RSC Ord 2, r 1, to cure irregularities, did not apply to failure to renew writs since RSC Ord 6, r 8 provided a comprehensive code for the renewal of writs. Furthermore, the court held, even if the irregularity were curable under Ord 2, r 1, the judge should not have exercised his discretion to cure it, because the failure to renew resulted in the writ being invalid for service and this was a fundamental defect in the proceedings.

With respect, one may entertain doubt about the first aspect of this decision. Ord 2, r 1 appearing as it does at the beginning of the RSC, is broadly drafted and is clearly meant to facilitate the curing of irregularities 'at any stage in the course of or in connection with any proceedings' and arising from any 'failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect.' It is submitted that even failure to use the Ord 6, r 8 machinery for renewing a writ should, in principle, be curable under Ord 2, for Ord 2 was designed to provide an all embracing discretion to remedy delays. To suggest that Ord 2, r 1 applies only where the rules do not provide a special procedure for the curing of irregularities, is to deprive Ord 2, r 1 of much usefulness. Of course, the failure to comply with the special procedure could play an important part in the exercise of the discretion under Ord 2, but the discretion itself should not be curtailed.

Mention may be made here of *Williams v Home Office (No 2)* [1982] 2 All ER 564, a further twist in the protracted litigation of which *Harman v Home Office*, discussed above, was a by-product. In 1975 the plaintiff claimed a declaration that his detention in a control unit, in the course of serving a

prison sentence, had been unlawful, and there was also a claim for damages for false imprisonment and trespass to the person. The claim for a declaration and damages was dismissed. In the course of his judgment, Tudor Evans J stated that there had been a breach of the prison rules but that, being bound by authority to do so, the breach of the rules did not confer a right of action. As the Court of Appeal was also bound in this respect, the defendant wished to challenge the authority in the House of Lords. However since he had not claimed damages for breach of statutory duty there would have been no issue upon which the Lords could entertain an appeal. Consequently the defendant sought leave from the Court of Appeal to amend his statement of claim so as to raise an appealable issue concerning breach of statutory duty. The Court of Appeal refused leave to amend and refused leave to appeal to the House of Lords against the refusal. If leave to amend were given, the court explained, and also leave to appeal to the Lords, the Lords—if they allowed the appeal—would then have to remit the action to the court of first instance to determine the question of damage suffered by the defendant. It was wrong, the court felt, to allow the defendant to go back to the court of first instance in order to produce evidence which could, and should, have been adduced many years before. The decision is, with respect, eminently sensible, though one can still not rest assured that this protracted and expensive litigation, conducted wholly at public expense, has come to its final and desirable end.

Limitation of action

Two cases reported in the current year deal with the effect of limitation of action in the following situation: the plaintiff issues a writ against a defendant within the limitation period; later—after the period has elapsed—it is proposed to add a further defendant. The question then arises should it be allowed, and if so—how does it affect the new defendant? In the first case, *Liptons Cash Registers and Business Equipment Ltd v Hugin (GB) Ltd* [1982] 1 All ER 595, the plaintiffs sued the first two defendants for breach of contract within the limitation period. Later they sought leave to add two new defendants claiming that they induced the former defendants to break the contract. The new defendants objected, arguing that the amendments should not be allowed because the joinder might deprive them of an accrued defence under the Limitation Act 1939, the limitation period having elapsed before the amendment. It was accepted that where, in such circumstances, the defendant's limitation defence was clearly going to fail, amendment should be allowed; and that, similarly, if the defence was clearly going to succeed, joinder should not be allowed. But the present case fell between the two poles—the new defendants had only an arguable defence under the Limitation Act. Judge Hawser QC reviewed a large body of authority from which he derived the following conclusions. First, that a party should not be added if the effect would be to deprive such party of a defence under the Limitation Acts. Second, an amendment adding a party generally took effect and operated retrospectively from the date when the writ was issued. Third, however, the court had power, at its discretion under RSC Ord 15, r 6(2)(b)(ii), to order the addition of a party 'on such terms as it thinks fit', and could give leave to add a defendant on condition that the proceedings against him should be deemed to have commenced at the date of the amendment and

not of the writ. This solution enables the court to defer decision on the limitation defence to the trial without in any way prejudicing the chances of its success. The course taken by the court seems so patently sensible that it is surprising that an extensive review of authority, ranging from 1844 to the present day, was required to justify it.

A similar situation came up on *Leadbitter v Hodge Finance Ltd* [1982] 2 All ER 167 where Bush J explained that in some circumstances it may be convenient to resolve the limitation issue when the joinder of a new defendant is under consideration, although in others the factual questions involved in the limitation issue may be so 'inextricably commingled' with the substantive facts as to make it much more convenient to deal with the matter at the trial. In any event Bush J was of the view that when permission to add a defendant is given the date of the action against him, for the purpose of limitation, is the date of the amendment and is not related back to the date of the writ. He desired support for this view from *Liff v Peasly* [1980] 1 All ER 623. This conclusion is somewhat at odds with the view expressed in the previous case, to the effect that an amendment dates back to the date of the writ. However, there is little substance in this difference of opinion. All are agreed that amendment should not be allowed to deprive a party of an accrued limitation defence. All are agreed that it is sometimes desirable to determine the defence at the trial itself. It makes little difference whether you achieve both these things by saying that while the amendment usually dates back the court may stipulate that it should not, or whether you achieve them by saying that an amendment does not date back at all. There is hardly a difference between the two avenues.

The Court of Appeal also saw a limitation case in *Ronex Properties Ltd v John Laing Construction Ltd* [1982] 3 All ER 961. It decided that a defendant, in this case one on whom third party notice was served, cannot apply, under RSC Ord 18, r 19(1)(a), to set aside the writ for third party notice on the ground that it discloses no cause of action merely because he claims to have a defence under the Limitation Acts. This is because limitation does not extinguish the right but merely provides a bar to the remedy. And even the bar itself, as Donaldson LJ pointed out, is 'subject to various exceptions, such as acknowledgment of a debt or concealed fraud which can be raised by way of reply' (at 965). The correct procedure for obtaining an early decision on the limitation defence is to seek the trial of a preliminary issue or, 'in a very clear case', to seek to strike out the claim on the ground that it is frivolous, vexatious and abuse of process and support such application by evidence (at 966).

Prisons

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1 Judicial review of prison discipline

Since the Court of Appeal's ruling in 1979 that prison boards of visitors in conducting disciplinary adjudications were bound to observe the rules of natural justice and were subject to certiorari (*R v Hull Prison Board of Visitors, ex p St Germain* [1979] 1 All ER 701) and the subsequent articulation of those rules as they applied to prison adjudications by the Divisional Court (*(No 2)* [1979] 3 All ER 545), there have been a number of cases raising more particular aspects of what procedural defects vitiate a fair hearing. One such case is *R v Blundeston Prison Board of Visitors, ex p Fox-Taylor* [1982] 1 All ER 646.

The applicant prisoner had been awarded 90 days loss of remission by the board of visitors which had found him guilty of the disciplinary offence of assault. He had pleaded not guilty but called no witnesses. However, another prisoner claimed to have witnessed the incident and so informed the prison officer involved in the matter before the adjudication, who told him to see a senior officer, but neither the applicant prisoner nor the board of visitors was aware of this and the prisoner did not give evidence. The chairman of the board in his affidavit indicated that the prisoner would have been asked to testify had they known of his existence.

The applicant, claiming that this amounted to a fundamental breach of the rules of natural justice, applied for judicial review to quash the board's determination. The board argued that, in telling the potential witness to see a senior officer, the prison officer had done all that he could be reasonably required to do. Phillips J in the Queen's Bench Division disagreed. The duty on the authorities was higher than that: they had an obligation to take reasonable steps to see that the existence of potential witnesses came to the notice of the board. They could not exercise their function properly if they were limited to those witnesses put before them by the officer in charge of the case. It was relevant to bear in mind, too, the inquisitorial nature of prison adjudications, that prisoners are not represented, and that they are often segregated pending the adjudication (Prison Rules 1964, SI 1964/388, r 48(2)), as in this case.

The board further argued that, in any event, the applicant had suffered no real or substantial prejudice, that any breach was merely trivial or technical. Again the judge disagreed, taking the view that it was impossible to say that the evidence of the prisoner if it had been taken would necessarily have had no effect on the decision; even if the finding of guilt had been the same, it might have led to a less severe penalty.

Finally, the board contended that certiorari should not lie since there was no failure by the adjudicating body. The failure rested with the staff of the prison. But the Divisional Court has issued certiorari when the prosecution in a magistrates' court failed to acquaint the defendant with the knowledge of

a potential witness: *R v Leyland Magistrates, ex p Hawthorn* [1979] 1 All ER 209. The fact is that the adjudicating process was defective, albeit the responsibility for that was not the board's, and their jurisdiction was therefore vitiated. The board's determination was accordingly quashed.

It is right to take a broad view of any failures in the adjudicating process and not confine judicial review to shortcomings on the part of the board of visitors. Relief should be available where the procedure has been defective and the hearing has not been fair, and it is immaterial that fault lay elsewhere than with the board. It is also right to attach importance to the failure of a material witness to give evidence and to stress that an obligation rests on prison staff to ensure that the board and the prisoner charged are acquainted with the fact that there is further evidence available if it is known to them.

2 Prisoner's right to institute proceedings and of access to the courts

Nothing in the Prison Rules did, or could, interfere with the fundamental right of a citizen, even if a convicted prisoner, to unimpeded access to the courts. So held the House of Lords in *Raymond v Honey* [1982] 1 All ER 756 in an unequivocal assertion of the proposition that a prisoner's basic rights were not automatically effaced as a result of imprisonment.

The respondent, Raymond, was a convicted prisoner serving a lengthy sentence; he was also awaiting sentence in respect of other matters and faced committal proceedings on yet other charges. In connection with the committal proceedings, he had solicitors, to whom he addressed a letter, but on reading the letter, the governor, Honey, prevented its being sent because it contained an allegation of theft against an assistant governor, which under arrangements then in force had first to be raised and investigated internally. Raymond regarded this as an interference with the course of justice and sought to have the governor committed for contempt, but his letter to this end addressed to the Crown Office was likewise stopped by the governor. This, too, in the prisoner's view amounted to a contempt. Eventually, somehow, both matters came before the Divisional Court ([1981] 2 All ER 1084) which found that the stopping of the first letter was not a contempt but stopping the second letter was. The appeal and cross-appeal came before the House of Lords.

At the outset, Lord Wilberforce, with whose speech Lords Elwyn-Jones, Russell and Lowry agreed, said (at p 759): '. . . under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication', and Lord Bridge expressly agreed with the proposition.

Section 47 of the Prison Act 1952 confers authority on the Home Secretary to 'make rules for the regulation and management of prisons', but that in Lord Wilberforce's view conferred no power to deny or interfere with a prisoner's right to have unimpeded access to a court. Section 47 was quite insufficient to authorise hindrance or interference with so basic a right. The Prison Rules, then, have to be interpreted accordingly; otherwise they would be ultra vires. There was thus no power under the Rules to stop an application addressed to a court, whatever general powers to control correspondence were available under the rules. The stopping of the respondent's letter to the High Court, by denying his right of access to the court, therefore constituted a contempt.

Lord Bridge, however, while agreeing with the conclusion, was unable to read the relevant rules other than as authorising restrictions on a prisoner's right of access to the courts. Since this could be authorised only by express enactment and s 47 was 'manifestly insufficient for such a purpose' (p 762), it followed that the rules, to the extent that they would fetter a prisoner's right of access to the courts and in particular his right to institute proceedings in person, were ultra vires.

As to the first letter, to Raymond's solicitor, which the governor also stopped, Lord Wilberforce felt it was open to doubt whether there was any power to stop such a letter, as the Divisional Court had supposed, but unfortunately declined to answer the point since Raymond had failed to substantiate his claim that a contempt was in fact committed. According to the governor, Raymond was told that he could rewrite his letter omitting the allegation against the assistant governor; and that in any event a visit from the solicitor was due to take place within a few days. The evidence left doubt about what happened, but it was for the applicant to make out his case and he had failed to do so. Lord Wilberforce was not therefore minded to dissent from the Divisional Court's view that the governor's conduct was not calculated to interfere with the due course of justice or the lawful process of the courts and was not therefore a contempt, and in this Lord Bridge also concurred. Lord Bridge, however, expressed more positively the view that the unjustified stopping of a letter between a prisoner and his solicitor was capable of amounting to a contempt. Lord Bridge further observed that it had been improper to stop the letter under the Prison Rules, since it fell within r 37A(1) (SI 1972/1860), which allows a prisoner who is a party to legal proceedings to correspond with his legal adviser in connection with those proceedings.

A prisoner, then, has a basic right to communicate with a court, and that right is in no way affected by his status as a prisoner. To interfere with that right by stopping a letter, for example, is a contempt of court if it obstructs or interferes with the due course of justice. To be protected, the prisoner's communication need not be an attempt to institute proceedings or be part of proceedings already in progress, but the interference will amount to a contempt only if the course of justice is obstructed or prejudiced. Likewise, despite Lord Wilberforce's refusal to be dogmatic on the point, a letter from a prisoner to a solicitor in relation to actual or potential proceedings is also protected by the law of contempt. To prevent a prisoner's making contact with his solicitor with a view to commencing proceedings effectively denied access to the court, as the European Court of Human Rights found in the *Golder Case* (1975) 1 EHRR 524, 531, para 26.

Prisoners are now generally free to write to courts and solicitors, subject to two restrictions, both of which are questionable. First, although the 'prior-ventilation rule' has been superseded by the 'simultaneous-ventilation rule', under which complaints about prison treatment may now be communicated to persons outside as soon as they have been raised internally, it no longer being necessary to await the outcome of the internal investigation, this may still result in a letter to a court or a solicitor being stopped because the prisoner has not complained internally and refuses to do so (because, for instance, he is reluctant to expose himself to punishment for the offence under r 47(12) of making a false and malicious allegation against an officer).

The Standing Order now provides that a letter to a court seeking to institute proceedings should not be stopped (Prison Department SO 5B 33 (a)), but this still leaves other legal letters vulnerable to the 'simultaneous-ventilation' rule.

Secondly, the Standing Order (5B 34 (k)) prevents a prisoner from writing to any person, including a solicitor, with the object of initiating a private prosecution. Since writing direct to a court is not the normal method of beginning a criminal prosecution, it is doubtful whether this prohibition conforms to *Raymond v Honey*.

One final point arising from the case concerns the status of the Standing Orders. Lord Wilberforce observed, erroneously, that the Prison Rules 'confer powers on the Secretary of State to make standing orders' (p 760). In fact, there is no reference anywhere in the rules or elsewhere to standing orders, but some rules are 'subject to directions of the Secretary of State' or empower the Secretary of State to 'impose restrictions', and the method of doing this will be by standing order, and to that extent, therefore, a few standing orders may be said to enjoy some indirect legislative force, and it may be this to which Lord Wilberforce refers. Later on, referring to the restrictions imposed by standing orders on correspondence, Lord Wilberforce says: 'The standing orders, *if they have any legislative force at all* . . .' (pp 760–761). The point is thus left open, for it is far from clear that a person upon whom a power to make delegated legislation is conferred is able under that delegated legislation to empower himself to legislate further by a different method and subject to no review or parliamentary control. The European Court of Human Rights, however, has just held that the standing orders may suffice to impart that degree of precision to the law, though not themselves law, so that they can be relied upon to justify an interference with prisoners' letters which is 'in accordance with the law' as required under the European Convention on Human Rights: *Silver v UK* (1983) Series A, No 61, paras 88–89.

This case is also discussed by Professor Miller in the article on Contempt of Court p 64, above.

Sentencing

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1 Guidance for sentencers

Partly suspended sentences

In *R v Clarke (Linda)* [1982] 3 All ER 232, the Court of Appeal lost no time in offering guidance to sentencers on the partly suspended prison sentence enacted in s 47 of the Criminal Law Act 1977 but not brought into operation until 29 March 1982 (SI 1982/243). (Section 47 of the 1977 Act has now been amended by s 30 of the Criminal Justice Act 1982.) The court was, however, mindful that it was early in the life of the new sentence so that its observations were necessarily tentative and might require modification in the light of experience.

Before imposing a partly suspended sentence, the court should ask itself whether a custodial sentence was really necessary. Even if the court felt such a sentence to be necessary, it should then ask itself whether it could make a community service order or suspend the whole sentence. If neither of those courses was possible, the third question was what was the shortest sentence that could properly be imposed. Sometimes 14 or 28 days might suffice (the minimum sentence which can be partly suspended is now three months, with 28 days the minimum period which must be served) and partial suspension is unnecessary. That may also make possible a fine or compensation order where appropriate.

If imprisonment is necessary, a very short sentence is not enough and total suspension is inappropriate, then partial suspension is to be considered. Great care must be taken, said Lord Lane CJ, to ensure that the power was not used to increase the length of sentence. The type of case the court had in mind was one where a sentence of at least six months' imprisonment was merited—it must be remembered that six months was then the minimum sentence in respect of which partial suspension could be ordered—but there were mitigating circumstances calling for a measure of leniency but not such as to warrant total suspension. The court, while conscious of the dangers, ventured a few examples:

(a) some serious 'one-off' acts of violence which are usually met with an immediate custodial sentence;
(b) some cases of burglary which at present warrant 18 months' or two years' imprisonment;
(c) some cases of fraud on public departments or some credit card frauds, where a short immediate term would not suffice;
(d) some cases of handling involving medium-range sums of money;
(e) some thefts involving breach of trust; and
(f) some cases of stealing from employers.

The court endorsed the view of the Advisory Council on the Penal System in 1978 which saw the sentence as especially applicable to serious first offenders

or first-time prisoners who have to serve some time in prison but who may be effectively deterred by serving only a small part of the sentence appropriate to the offence. The court also thought it appropriate for prisoners whose last term of imprisonment was some considerable time ago. The principle was articulated by Lord Lane thus:

> 'We think that the power can be used on occasions where something more than a short sentence of immediate imprisonment is required to mark public disapproval and as a deterrent to others, but where the circumstances of the particular offender are such that some short term of imprisonment, coupled with the threat involved in the suspension of the remainder, is enough to punish him for what he has done and to deter him in the future' (at p 236).

The court also had to deal with the technical question of whether it was proper to impose a partly suspended sentence on an offender whose offence was committed before 29 March 1982 when the power came into force. Since as time goes by, fewer defendants will have committed their offences before that date and the court gave an unequivocal answer, it will suffice here to record that the court concluded that there was no impediment to the use of the new sentence in relation to offences committed before the commencement date.

The court finally called for more effective methods of protection against credit card frauds.

Sentence for rape

In *R v Roberts* [1982] 1 All ER 609, the Court of Appeal responded to public concern and agitation over the proper sentence for the offence of rape. Rape, said Lord Lane CJ, is always a serious offence and calls for an immediate custodial sentence, except in wholly exceptional circumstances, in order to mark the gravity of the offence, to emphasise public disapproval, to serve as a warning to others, to punish the offender and to protect women. Since rape cases vary so widely, the actual length of sentence will depend on all the circumstances.

Aggravating features include the use of a weapon to frighten or injure the victim, where the victim sustains serious injury, mental or physical, where violence is used over and above that necessarily involved in the act itself, where there are threats of a brutal kind, where the victim has been subjected to further indignities or perversions, where the victim is young or elderly, where the offender is in a position of trust (which includes a husband aiding and abetting his wife's rape), where the offender has intruded into the victim's home, where the victim has been deprived of her liberty for a period of time, where the rape is carried out by a group of men, and where the offender has committed a series of rapes on different women or the same woman.

Additional requirements in a probation order

In *Cullen v Rogers* [1982] 2 All ER 570, the House of Lords held that it was not possible to include a requirement as to attendance at a day centre in a probation order, but this has now been altered by the Criminal Justice Act

1982, s 65 and Sch 11. However, a few of the general comments made in *Cullen v Rogers* in relation to requirements in probation orders remain of interest.

First, the fact that a probation order may be made only if the defendant expresses a willingness to comply with its requirements cannot confer jurisdiction to include requirements not otherwise authorised by the terms of the statute.

Secondly, despite the wide terms in which s 2(3) of the Powers of Criminal Courts Act 1973 is drawn, empowering the court to impose such requirements as it 'considers necessary for securing the good conduct of the offender or for preventing a repetition by him of the same offence or the commission of other offences', the power to impose requirements is subject to limitation in at least two respects. Probation is a course taken to avoid passing a sentence and a requirement under s 2(3) must not therefore introduce such a custodial element or other element as will amount in substance to the imposition of a sentence—unless, that is, it is expressly authorised by the statute. Further, any discretion conferred on the probation officer under the order to regulate the probationer's activities must also be confined within well-defined limits. For example, a requirement pursuant to s 2(3) could not require the performance of such unpaid work as would be apprpriate to the subject of a community service order, or require residence in any institution (although such a requirement may be imposed under s 2(5)).

These general considerations must be borne in mind by courts in the light of the specific provisions in the Powers of Criminal Courts Act 1973 as amended by the Criminal Justice Act 1982.

2 Forfeiture, criminal bankruptcy and compensation

Forfeiture of property: personal property only

The power under s 43 of the Powers of Criminal Courts Act 1973 to make a forfeiture order depriving an offender of property used in the commission of the offence does not extend to real property. This was the conclusion reached by the Court of Appeal, Criminal Division, in *R v Khan* [1982] 3 All ER 969, based on s 43(4) of the Act, which refers to the property being in the possession of the police and accordingly limits it to personal property, and the similar view which had been expressed in relation to a corresponding provision in the Misuse of Drugs Act 1971 (see *R v Beard* [1974] 1 WLR 1549 and *R v Cuthbertson* [1980] 2 All ER 401, HL). An order against a defendant convicted of drugs offences to forfeit a house used in connection with the crime was therefore quashed. Whether such a power should be available in a case where the defendant has made enormous profits from his criminal activity is worthy of consideration. A committee set up by the Howard League for Penal Reform under the chairmanship of Hodgson J is examining the law relating to forfeiture orders made by criminal courts. (For a review of the current law, see Fox, 'The Operation of Forfeiture Orders in Modern Criminal Law' (1983) 147 JPN 185 and 200.)

The court also made observations on the appropriate level of sentence in serious drugs cases.

Criminal bankruptcy orders—variation of sentence

Two questions arose in *R v Reilly* [1982] 3 All ER 27, CA. First, can a criminal bankruptcy order be made on conviction of conspiracy? Secondly, to what extent can the trial judge vary a sentence once passed?

(i) *Criminal bankruptcy and conspiracy* A criminal bankruptcy order may be made where loss or damage has been suffered 'as a result of the offence' (Powers of Criminal Courts Act 1973, s 39(1)(*a*)). It was contended that this wording precluded the making of an order against an offender convicted of conspiracy, since the loss or damage resulted, not from 'the offence', which was conspiracy, the essence of which was the agreement, but from acts done pursuant to that conspiracy. Such a submission had found no favour with the court in relation to the comparable provision on compensation orders in s 35(1) of the Act (*R v Gleaves*, 21 April 1977, unreported); and it had been similarly rejected by the court, also in relation to compensation orders, in the case of receiving stolen goods, where the argument had been that the loss resulted from the theft and not the receiving (*R v Howell* (1978) 66 Cr App R 179). The concept of causation which applies to the assessment of damages in civil law did not apply when making a criminal compensation order (*R v Thomson Holidays Ltd* [1974] 1 All ER 823, 829, per Lawton LJ) and a commonsense approach was to be adopted. However, counsel maintained that these decisions had been superseded by *R v Cuthbertson* [1980] 2 All ER 401, HL, in which Lord Diplock held that a forfeiture order under the Misuse of Drugs Act 1971 could not be made following a conviction for conspiracy to contravene the Act as that was not 'an offence under this Act' (s 27(1)) and as conspiracy was by definition not an offence to which tangible objects could 'relate' as required under the Act (ibid). In *Reilly*, Kerr LJ thought that this latter point of Lord Diplock's had no bearing on criminal bankruptcy orders: the words in s 27(1), 'relating to the offence', had no counterpart in s 39(1) and the Court of Appeal authorities remained binding.

Any loss or damage suffered as a result of acts done by conspirators in pursuance of the conspiracy is 'as a result of the conspiracy'. Moreover, although the offence of conspiracy is complete once the agreement has been made, it remains in being if the planned acts are in fact performed (see *DPP v Doot* [1973] 1 All ER 940, HL). Because of the wide meaning of the words 'as a result of' in s 39 and because the conspiracy continued, it was proper to speak of the loss resulting from the conspiracy, and there was therefore jurisdiction to make the criminal bankruptcy order.

The court did certify that this involved a point of law of general public importance, but refused leave to appeal, as did the Appeal Committee of the House of Lords.

(ii) *Variation of sentence* The criminal bankruptcy order had been imposed in *Reilly* on the same day as the other sentences and orders had been passed and made but after an adjournment. Was this a variation of sentence permitted by s 11(2) of the Courts Act 1971 (now Supreme Court Act 1981, s 47(2)), which provides that a sentence imposed or order made by the Crown Court may be varied or rescinded within 28 days?

The appellant argued that the power to vary did not extend to a fundamental change of mind which added to or varied the sentence so as to make it more severe, citing *R v Grice* (1977) 66 Cr App R 167. However, the court had taken a different and wider view in the later case of *R v Sodhi* (1978) 66 Cr App R 260 and this had attracted the support of the House of Lords, albeit obiter, in *R v Menocal* [1979] 2 All ER 510, 516, 520–521. The word 'varied' in the section bore its ordinary meaning and permitted change of a fundamental kind even if it increased the severity of the sentence already pronounced.

These somewhat strained arguments on behalf of the appellant to impugn the criminal bankruptcy order may be attributable, at least in part, to the curious provision that no appeal lies against the making of a criminal bankruptcy order (Powers of Criminal Courts Act 1973, s 40(1)), which does not of course exclude arguments based on a want of jurisdiction or procedural irregularity.

Compensation orders against local authority guardian

Where a child or young person has been convicted of an offence and a compensation order is made, the court may order that the compensation be paid by the parent or guardian (Children and Young Persons Act 1933, s 55, as amended by the Powers of Criminal Courts Act 1973, s 35; since further amended by the Criminal Justice Act 1982, s 26). The principal question before the House of Lords in *Leeds City Council v West Yorkshire Metropolitan Police* [1982] 1 All ER 274 was whether such an order could be made against a local authority if the child or young person was in the care of the authority when he committed the offence.

'Guardian' is defined in the 1933 Act (s 107(1)), unless the context otherwise requires, as including any person who in the court's opinion has for the time being the charge of or control over the child or young person. Despite this general wording, the unanimous view of the House was that a local authority was not 'a parent or guardian' for the purpose of s 55 of the 1933 Act, the object of which was to provide a sanction against the parent or guardian who failed to exercise proper control. It imposes a penalty on parents or other individuals who assume the de facto guardianship of a child if they fail to exercise proper control and does not cover local authorities or other legal persons in respect of which other remedies are provided. *R v Croydon Juvenile Court Justices, ex p Croydon LBC* [1973] 1 All ER 476, DC, was overruled.

Lord Scarman's careful tracing and discussion of the relevant legislative history does not, it is submitted, bear out the conclusion to which he comes. Compensation as an ancillary order in criminal or care proceedings is not primarily a sanction or penalty: its purpose is to compensate the victim in the simplest and most convenient way. Other remedies are available to victims against private individuals, yet compensation may still be awarded by a criminal court. To require the victim to resort to cumbersome, costly and uncertain civil proceedings against a local authority is wholly unrealistic and simply denies the victim the compensation to which he is entitled. Reference is made to the Criminal Injuries Compensation Board, but that covers only personal injury and in any event could only be an argument against compensation awards in general: it is not a reason for declining to permit orders

against local authorities. Reference is also made to the authority's electoral accountability, but this cannot seriously be seen as material in this context.

A compensation order against a parent or guardian may be made under s 55(1)

> 'unless the court is satisfied that the parent or guardian . . . has not conduced to the commission of the offence by neglecting to exercise due care of the child or young person'.

This is a crucial provision since it ensures that compensation is to be awarded only if the parent or guardian has been at fault. It is undeniable that in its care of a child a local authority, through those to whom it entrusts the child's care, may conduce to the offence's commission by neglect of the child just as a parent or individual guardian might. If that is so, what reason is there for denying compensation to the victim, particularly as the offender's parent cannot be subject to an order, since he does not have charge or control of the child at the time? The definition of 'guardian' in s 107(1) (supra) is deliberately wide and general and is perfectly apt to include a local authority. That a local authority is merely exercising its statutory duties in caring for the child cannot be relevant. It is true that many of these children and young persons will have criminal propensities and pose difficulties for the local authority; but compensation may be awarded only where the authority has been neglectful in exercising care and the kind of child and all surrounding circumstances will be relevant in determining that question. Nowhere in his impressive (if unhelpful) exegesis of the legislative history does Lord Scarman pause to observe that the primary function of compensation is to benefit the victim and to lay the burden on the person responsible, directly or indirectly. He proceeds entirely on the fallacious assumption that a compensation order punishes the defaulting parent or guardian: he sees it only as a sanction or penalty. The view of Lord Widgery CJ in the *Croydon* case (supra) is more compelling and makes much more sense. Its unanimous overruling in the present case is regrettable.

More acceptably, it was pointed out that a local authority which allowed a child in care to join his parents or other person for a holiday or weekend did not thereby transfer charge and control to the parent (or other person), but such a transfer of de facto guardianship could take place even without terminating its statutory care, in which case that person became the parent or guardian under s 55.

3 Technical questions relating to custody

Is 'committal to custody' for breach of a magistrates' order 'imposing imprisonment'?

An appeal on a point of law in connection with an order by justices committing a husband to prison under the Domestic Proceedings and Magistrates' Courts Act 1978 lies to the Divisional Court of the Family Division, and in *Head v Head* [1982] 3 All ER 14 that court was invited to rule on whether a committal to custody under s 63(3) of the Magistrates' Courts Act 1980 for breach of an order under the 1978 Act was 'imposing imprisonment' under s 133(1) so that it could be made to run consecutively to another period of imprisonment.

Under s 63(3) of the 1980 Act, a person who disobeys an order of a magistrates' court to do or abstain from doing anything may be committed to custody which, by s 150(1), means committed to prison. If such a committal is 'imprisonment', it may be made consecutive (s 133(1)), but otherwise it must take effect from the day on which it is ordered. The words 'commit to prison' in s 150(1) mean

> 'pass a sentence of imprisonment or fix a term of imprisonment . . . for failure to do or abstain from doing anything required to be done or left undone' (ibid),

but

> '"sentence" does not include a committal . . . for failure to do or abstain from doing anything required to be done or left undone' (ibid).

The effect of these provisions, then, is that a committal to custody is a committal to prison, but such a committal may be made consecutive only if it is 'imposing imprisonment', and that means passing a sentence or *fixing a term of imprisonment*. It cannot be a sentence of imprisonment, since 'sentence' expressly excludes committal for failure to do or abstain from doing something, and it is of course understandable not to treat this as a 'sentence'. On the strength of this, the court concluded that a 'committal to custody' was not the same as imprisonment. But this ignores the alternative formulation 'or fix[es] a term of imprisonment . . . for failure to do or abstain from doing anything', which covers the situation precisely. The court's conclusion, therefore, flies in the face of the statutory wording and cannot be regarded as tenable.

The court sought to draw support for their conclusion from the earlier decision of the Divisional Court of the Probate, Divorce and Admiralty Division in *B(B) v B(M)* [1969] 1 All ER 891, 899, concerning the previous version of s 63(3) found in the Magistrates' Courts Act 1952, where the court concluded that such a committal to custody could not be suspended under the provisions for suspending sentences of imprisonment in the Criminal Justice Act 1967. The court reasoned that those provisions applied only to criminal proceedings and not therefore to a 'civil' committal under the then s 54(3) of the 1952 Act. This is an altogether different matter and has no bearing on whether such a committal is the imposition of imprisonment for the quite distinct purpose of ordering the term to run consecutively. *B(B) v B(M)* lends no support to the conclusion reached in *Head*.

This decision is an authority not only on committals following a breach of an order under the Domestic Proceedings and Magistrates' Courts Act but also in relation to any other matter which gives rise to a committal to custody under s 63(3) of the Magistrates' Courts Act or indeed any other comparable provision. Its effect is that such a committal must take effect on the day it is imposed and cannot be made consecutive to any other term imposed at the same time or earlier. This means there will be cases where a person is, say, already in custody on some other matter and the committal will be a pure formality. This cannot have been intended and it is not what the statute says. It is to be hoped that a different view will prevail elsewhere in due course, on the assumption that the Queen's Bench Divisional Court is not bound by the Divisional Court of the Family Division (see Cross, *Precedent in English Law* (3rd edn, 1977) pp 121–122). Meanwhile, magistrates' courts are in a difficult position.

Computation of sentence

Section 67(1) of the Criminal Justice Act 1967 provides that the length of any prison sentence shall be treated as reduced by any period of pre-sentence custody to which the offender was committed in connection with any proceedings relating to the sentence or the offence for which it was passed or any proceedings from which those proceedings arose. If the custody resulted from other proceedings involving the offender, that period does not count. This may produce an unjust result, as Lord Lane CJ recognised in *R v Governor of Blundeston Prison, ex p Gaffney* [1982] 2 All ER 492, DC, dismissing the prisoner's application for habeas corpus.

The prisoner had been committed in custody to the Crown Court for sentence, which court deferred sentence. During the period of deferment, he was again committed in custody to the Crown Court for sentence by a different magistrates' court on other charges. The Crown Court dealt with both committals at the same time, sentencing him to 37 months in relation to the first committal and three years concurrent on the second. According to the Home Office, in calculating the prisoner's release date, the longer of the two sentences is taken and reduced by any related period of pre-sentence custody. The first period of custody was taken into account for this purpose, but the period in custody following the second court's committal, not relating to the first set of proceedings, did not count at all. There were therefore two months' custody which were ignored when it came to calculating the prisoner's release date. This was the injustice to which Lord Lane referred, and it is unlikely that Parliament intended such a result in enacting s 67(1), although the wording allowed no other interpretation. Section 67(1) was in fact amended last year (by s 34 of the Criminal Justice Act 1982) to remove another anomaly resulting from the fact that custody not ordered by a court (eg by immigration authorities) was also outside the terms of the section. It is unfortunate that it was not also amended to provide for a sentence to be reduced by any period spent in custody in relation to a sentence of imprisonment being served concurrently which has not otherwise been taken into account in reducing the sentence. This is precisely the kind of problem which will only be cured when a suitable omnibus Bill is available and it may thus be several years before an opportunity again presents itself. Meanwhile, would it not be proper for the Home Secretary to remove the injustice by use of the royal prerogative?

One other aspect of the case calls for comment. At the end of his judgment (with which the other two members of the court agreed), Eastham J commented: '. . . in any event, as this is a discretionary matter, it would not be a matter for habeas corpus' (p 494). This is presumably a reference to the fact that even on the prisoner's view of the meaning of s 67, he was still lawfully detained in prison because the remission of one-third of the sentence was entirely discretionary and it was for the Home Secretary to decide whether or not to release him before the expiry of the full sentence (less any periods under s 67). It is indeed true that remission of sentence is a discretionary matter (see [1980] Crim LR 695), but it would be highly regrettable if a court declined to intervene in a case such as this and rule on the merits on that ground alone, as the Divisional Court recognised in *Re Savundra* [1973] 3 All ER 406, 408. Too much weight should not of course be placed on a single

sentence in an unreserved judgment. A declaration would serve equally well and Eastham J could not have meant that no relief was available.

Release on bail following a recommendation for deportation

Where a person is released on bail (pending sentence in the Crown Court) by one court and another subsequently makes a recommendation for deportation in respect of other charges with no direction as to release, the person is to be detained notwithstanding the earlier release on bail. Only the court seised of the deportation recommendation may admit to bail or direct release in relation to the recommendation. So held the Divisional Court in *R v Governor of Holloway Prison, ex p Giambi* [1982] 1 All ER 434, interpreting para 2(1) of Sch 3 to the Immigration Act 1971, which reads:

> 'Where a recommendation for deportation made by a court is in force in respect of any person, and that person is neither detained in pursuance of the sentence or order of any court *nor for the time being released on bail by any court having power so to release him*, he shall, unless the court by which the recommendation is made otherwise directs, be detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary of State directs him to be released pending further consideration of his case' (emphasis added).

The italicised words were not to be read as meaning that admission to bail by any court on any matter quite unrelated to the case that resulted in the recommendation had the effect of releasing a person who is subject to a recommendation for deportation. The words 'having power so to release him' meant a power in relation to the recommendation. The contrary construction would, said McNeill J (at p 436), be absurd.

That still left the question of which court or courts did have power to order release. In *R v Zaman* (1975) 61 Cr App R 227, CA, Lawton LJ suggested that it was only the court which actually made the recommendation. In the present case, while leaving open the question of whether a High Court judge exercising the inherent jurisdiction of the Queen's Bench Division fell into the description of 'any court' for this purpose, the court was of the view that the power did extend to any court seised of the question of deportation, whether the recommending court or the Crown Court on appeal from the magistrates' court.

Many of these difficulties have now been laid to rest by the Criminal Justice Act 1982 (s 64 and Sch 10) which amends Sch 3 to the Immigration Act. It is now explicitly provided that a court determining an appeal may direct release without setting aside the recommendation (Sch 3, para 2(1A)). It would appear from this that a judge exercising the jurisdiction of the Queen's Bench Division has no power to order release.

4 Appeals

Appeal against revocation of parole licence

If a person has been granted parole or released on licence from a life sentence and is subsequently convicted of an indictable offence punishable with imprisonment during the currency of that licence, the Crown Court may, whether or not it passes any other sentence for the offence, revoke the licence

(Criminal Justice Act 1967, s 62(6) and (7)). Is it possible to appeal to the Court of Appeal against such revocation? In other words, is the revocation a 'sentence . . . passed on him for the offence' under s 9 of the Criminal Appeal Act 1968? In *R v Welch* [1982] 2 All ER 824, the Court of Appeal answered in the affirmative.

By s 50(1) of the 1968 Act, 'sentence' includes 'any order made by a court when dealing with an offender'. In *R v Raeburn* (1980) 74 Cr App R 21, the court held that an order to make a contribution towards legal aid costs was not a sentence within the ambit of s 9, since such an order may be made whether or not the defendant has been convicted: it is made not for the offence but in respect of the costs incurred in the proceedings. But revocation of a licence requires a conviction. Moreover, s 62(7) of the Act of 1967 permits revocation by the Crown Court 'whether or not it passes *any other* sentence' (emphasis added), which makes it clear that revocation is a sentence and indeed may be the only sentence passed. *Raeburn*, therefore, could be properly distinguished.

Binding over to leave the country

An 18-year-old British subject was convicted in the Crown Court of theft. The judge intimated that he was minded to sentence the defendant to borstal training but, on being told that the defendant's mother was returning to Jamaica and planned to take the defendant along, he indicated that he would be prepared to bind the defendant over in his own recognisance conditional on his accompanying his mother to Jamaica and not returning to England for five years. The defendant replied that he had been brought up in England, had never lived in Jamaica and had no wish to spend five years there, but he consented to the order when the judge pointed out that the alternative was a custodial sentence. The defendant appealed to the Court of Appeal under s 9 of the Criminal Appeal Act 1968, which provides that a person convicted on indictment may appeal against any sentence imposed. In *R v Williams (Carl)* [1982] 3 All ER 1092, the Court of Appeal had first to decide whether a binding-over order was a 'sentence' within the meaning of s 9, and, if it was, whether the order was appropriate in the circumstances.

Although, as Lord Lane CJ observed in giving the court's judgment, the judge's order on the face of it was anything but a sentence—it was rather a respite of judgment—it plainly fell within the definition of 'sentence' found in s 50(1) of the 1968 Act, which 'includes any order made by a court when dealing with an offender' (notwithstanding any comments to the contrary in *R v Dwyer* (1975) 60 Cr App R 39).

It is clear (from s 79 of the Supreme Court Act 1981) that the Crown Court has power to bind over a convicted person on recognisance to come up for judgment if called on and (from a long list of authorities) that it is open to the court to impose as a condition a term that the defendant leave England for his own country and not return for a specified period; but was the bind over and its condition appropriate in this case?

A defendant must consent to the order or acknowledge himself bound by its terms, but that consent, said Lord Lane, referring to *Veater v G* [1981] 2 All ER 304, DC, was not vitiated because it was given under threat of imprisonment. However, the power to keep a defendant out of the jurisdiction on pain

of imprisonment, added Lord Lane, should be used very sparingly, and will be rare where the defendant does not freely give his consent. It should be used only to ensure that the defendant goes to a country of which he is a citizen or in which he is habitually resident or where there are very special circumstances in which the receiving country is prepared to take him for his own well-being. On the facts of the present case, the order should not have been made. The appellant had been born in England, was a British citizen, had never lived in Jamaica and did not wish to do so, and it was uncertain how long his mother would remain there. The court therefore substituted a conditional discharge for 12 months.

Shipping

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1 The Salem

It is unusual to find a case on marine insurance. In that most traditional of markets litigation is not the rule. But *Shell International Petroleum Co Ltd v Gibbs, The Salem* [1982] 1 All ER 225 (Mustill J), 1057 (CA) concerns a very important issue: how far is maritime fraud covered by the standard Lloyd's S.G. policy? The answer is, after much wide-ranging discussion, only to a limited extent—indeed, on the facts of the case, only as to 8%. Despite the fact that the issues raised are fundamental and the analysis displayed complex and deep, it is difficult to assess the significance of the case. For it is a case on Lloyd's policy and Lloyd's policy, after a reign of more than 200 years, is under sentence of death.

The *Salem* arose out of the determination by a group of conspirators to take advantage of the embargo operated by Arabian Gulf oil producers on trade with South Africa. The conspirators procured a contract from the South African Strategic Fuel Fund Association (SFF) for the delivery of a cargo of crude oil and used it to obtain finance to purchase a tanker, the South Sun. The South Sun was crewed, renamed the Salem and offered for charter for a voyage from the Gulf to Northern Europe. She was chartered by Pontoil, who nominated her under an fob contract for the purchase of 195,000 tons of crude oil from the Kuwait Oil Co. The Salem loaded and sailed. Pontoil sold on the oil cif to Shell. The Salem, now the Lema (an alteration requiring minimum use of paint), turned aside from her voyage round the Cape of Good Hope and discharged most of her cargo at a single buoy mooring some 1½ miles off Durban. The conspirators were paid, the money went to Swiss bank accounts, and the vessel proceeded to a convenient spot off Senegal where she was scuttled. Some 15,840 tons of oil had been left in her tanks, which had been topped up with sea-water to give her a laden appearance, but whether that had been done in order to provide a moderately convincing oil-slick when she went down, or had been an unlooked-for consequence of difficulties with her discharging pumps at Durban was not clear.

The scuttling was seen, indeed filmed, by the master of another vessel, the British Trident, which took off the Salem's crew. The plot was discovered. Pontoil had insured their cargo, in ordinary form, and Shell claimed as assignees of that policy. Both Pontoil and Shell were entirely innocent of the fraud. Shell had been able to trace some of the oil landed at Durban and was able to settle claims in respect of it for a sum roughly equivalent to 60% of the value of the cargo.

The policy was in Lloyd's SG form with the Institute Cargo Clauses (FPA) attached. The language of that policy is ancient. In its essence it was settled in 1779, but even then it received little judicial approbation. In 1791, in *Brough v Whitmore* 4 TR 206, at p 210, Buller J described it as an 'absurd and incoherent instrument'. May LJ, in the instant case, expanded upon that opinion. He did

not think the language used to define the perils covered, although terms of art, contributed 'to the desirable quality of certainty' and he urged redrafting, noting the existence of 'international discussions' on the matter (at p 1072 b–d).

Events had, perhaps, overtaken the learned Lord Justice. In addition to the 'international discussions' which continue at UNCTAD, the Institute of London Underwriters and Lloyd's Underwriters' Association had already produced new Institute Cargo Clauses which are not dependent upon the archaic Lloyd's SG form. The Institute Cargo Clauses 1982 were available from 1 January 1982 and the London market has agreed not to use the old forms after 31 March 1983. The effect of this change upon the issues raised in the *Salem* will be considered later.

In this case, however, the court had to apply the old form whose charmingly quaint list of perils does not specifically include fraud:

> 'Touching the adventures and perils which we, the assurers, are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt; detriment, or damage of the said goods, and merchandises, and ship, etc., or any part thereof.'

Over the years, 'perils of the seas', 'barratry' and 'takings at sea' have all been appealed to in cases involving some sort of maritime fraud. However, in this case, it appeared that the issue might be settled *in limine*.

The policy sued upon was a voyage policy. The risk covered was the voyage from Mina al Ahmadi in Kuwait to ports in Northern Europe. The voyage she actually sailed on was from Kuwait to Durban. The Marine Insurance Act 1906, s 44, provides that 'where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach'. However, the then Institute Cargo Clauses were attached and clause 4 provides for a change of voyage by a 'held covered' provision, whereby the new voyage might be covered at a premium to be arranged. It is accepted that prompt notice to the underwriter is a condition precedent to liability under this clause (see per Donaldson J in *Liberian Insurance Agency Inc v Mosse* [1977] 1 Lloyd's Rep 560). However, for his own reasons, neither party wished to raise s 44 or clause 4. The plaintiffs had not, of course, given notice; nor, despite the invitation of Mustill J did they wish to during the proceedings. As the plaintiffs saw it, the alteration of course to Durban was likely to be crucial in establishing a loss by an insured peril: to give notice removed any significance from that alteration. On the other hand, the underwriter did not wish to argue that the original destination was Europe, since the essence of his case was that the change of course was immaterial. They did not, therefore, wish to argue that notice should have been given. Both sides made concessions with the effect that s 44 should have no application. This seemed to cause both Mustill J and Lord Denning MR some concern (at 233 d, and 1061 j, 1062 a–e) but both courts accepted the result.

This being so, Mustill J at first instance had to consider which peril might be called into play. 'Barratry' he rejected. Although this mediaeval word had the original meaning of 'trickery', which was certainly apt to describe the activities of the conspirators, in marine assurance usage it had long been established that the trickery had to be that of the master and crew against the owners. Here the shipowners were tricksters themselves, not victims. Action against charterers can only constitute barratry if the charterers, as is the case with bareboat charterers, have taken over direction of the vessel so as to become 'owners pro hac vice', which was not so in this case. Nor could assistance be derived from the decision of the Court of Appeal in *The Michael* [1978] 1 All ER 1233 which might seem to establish that misconduct by crew members was prima facie evidence of barratry, which presumption might be displaced by the underwriter's proving lack of privity by the owner. In this case the fact of the shipowner's involvement was beyond question. Barratry was not to be extended.

On the face of it 'perils of the seas' seemed a reasonable candidate, at least for that part of the cargo which sank with the Salem off Senegal. Sinking is, after all, a risk that sea-going ships and their cargoes run. To this simplicity must be added one complexity. In the case of *Samuel v Dumas* [1924] AC 431, [1924] All ER Rep 66, the House of Lords, despite the vigorous dissent of Lord Summner, held that an innocent mortgagee of a ship scuttled by its owner had no claim on his policy for a peril of the sea: narrowly, because the deliberate casting away of a ship (unlike its negligent loss) lacked the element of 'fortuity' which had been required for perils of the sea at least since the decision of the House of Lords in *The Xantho* (1887) 12 App Cas 518, [1886–90] All ER Rep 220; more widely because, in the words of Viscount Finlay, 'the possibility of scuttling is not a peril of the sea, it is a peril of the wickedness of man'. This was hard not only on innocent mortgagees but upon the more numerous innocent cargo-owners. To meet this, clause 8 of the Institute Cargo Clauses was amended so as to include the following words:

> 'In the event of loss, the Assured's right of recovery hereunder shall not be prejudiced by the fact that the loss may have been attributable to the wrongful act or misconduct of the shipowners or their servants, committed without the privity of the Assured.'

Whether this form of words was effective to achieve the reversal of the decision in *Samuel v Dumas* (for had not the House decided that there was never a recoverable loss rather than that recovery was barred by the misconduct of the shipowner?) it was commonly accepted that such was the aim of the original draftsman and of the parties to the instant contract. The underwriters made yet another concession and did not take the point that clause 8 might not be effective. However, for Mustill J the point did not require decision. Whether or not the 15,840 tons were lost by a peril of the sea, in his view all 195,000 tons were lost by another peril, a 'taking at sea'.

In *Nishina Trading Co Ltd v Chiyoda Fire and Marine Insurance Co Ltd, The Mandarin Star* [1969] 2 All ER 766 during a voyage from Bangkok to Kobe the shipowner, in pursuit of a dispute with time charterers, stopped the vessel off Kobe and ordered the master to proceed to Hong Kong. There the cargo was unloaded and pledged with a bank as security for an advance. The cargo

did not belong to the time charterers but to the plaintiffs who succeeded in a claim on their goods policy which was in Lloyd's SG form. For Lord Denning MR and Phillimore LJ the main reason for their success was that the re-direction of the vessel off Kobe constituted a 'taking' by the shipowner of the cargo 'at sea'. The goods had lawfully been in the possession of the master of the Mandarin Star but, off Kobe, the quality of that possession changed: he ceased to hold as bailee to the cargo-owners direction and began to possess as bailee to the shipowner's direction.

Mustill J recognized that the Mandarin Star represented an extension of what had previously been understood as the ambit of the phrase 'taking at sea', but was bound by that decision. Applying it to the facts before him, he considered in depth three possible moments when such a 'taking' might have occurred. He rejected the contention that the taking took place when the oil was loaded aboard the vessel: there was a voluntary, albeit mistaken, yielding of possession by Pontoil, which was not a 'taking'; further, there was not a sufficiently overt act to signify the taking. There was, however, an overt act when the Salem turned off her course and made for Durban and again when the oil was discharged at the single buoy mooring 1½ miles offshore. The change of course clearly occurred 'at sea' and so, in Mustill J's judgment, did the discharge at the mooring. Discharge into lighters while standing offshore would have been 'at sea' and discharge into a fixed mooring buoy, if not 'at sea' in its own right ought to be considered covered under the 'general words'—the 'all other perils' clause which concludes the enumeration of risks covered and which, it has long been established, must be construed *ejusdem generis* with a named peril.

Finally, his Lordship dealt with a more general point. Given that there had been a 'taking at sea', had not the loss truly been caused by the existence of the conspiracy, which was in operation even before the oil was loaded aboard the Salem rather than the taking, which was merely the execution of the plot? This argument he rejected on the facts. When the oil was loaded, from the conspirators' point of view there was still the possibility of a hitch. For example, they had originally contracted to supply Saudi Arabian light crude but proposed to deliver Kuwaiti crude. More important, there were problems to solve with regard to the documentation of the cargo. The cargo was not 'irretrievably doomed' at Mina al Ahmadi. It was, however, at Durban. The effective cause of the whole loss was the taking or, (it was immaterial in his Lordship's view) the effective cause of part of the loss was the taking and part the scuttling, deemed a peril of the sea by clause 8. This conclusion dealt with the possible difficulty arising from the fact that the oil was insured 'FPA', that is 'Free of Particular Average', ie on terms that in general the underwriter will pay for a total loss but not for a partial loss. On this analysis there was either a total loss by one peril insured against (taking at sea) or two partial losses by two perils insured against (taking at sea and peril of the sea) which could be aggregated to a total loss. The aggregation is generally accepted as permissible on analogy with the allowed aggregation (in one voyage) of partial losses (in a voyage policy) if the result is to raise the level of losses above the percentage in the 'Memorandum' (or 'lower cut-off point') which Lloyd's policies commonly used to contain (see *Blackett v Royal Exchange* (1832) 2 Cr and J 244, [1824–34] All ER Rep 468). There is, however, no direct authority on the application of the principle to a total loss.

Nor does Mustill J discuss the point in depth (at 233 e–g). The 15,840 tons could be recovered as a partial loss even under FPA policy, however, since partial losses may be recovered if the ship is 'sunk'.

The underwriters appealed to the Court of Appeal (Lord Denning MR, Kerr and May LJJ). The Master of the Rolls recanted. *Mandarin Star* had been decided per incuriam. He and Phillimore LJ had misunderstood dicta of Lord Wright and Viscount Simon LC in *Rickards v Forestal Land Timber and Railways Co Ltd* [1942] 3 All ER 62. In that case (or rather those cases, since these were consolidated test cases all arising from the same event) German masters at the outbreak of the Second World War had obeyed instructions from their government and deviated from their voyage routes and, in some cases, scuttled their vessels. In cargo owners' claims there was held to be a loss by 'restraint of princes'. The masters had 'taken' the cargoes, it is true, but the distinction between the test cases and *Mandarin Star* was that in the test cases the German masters ceased to hold the cargoes as bailees employed by the shipowners, to the direction of cargo owners under contracts of carriage and became instead a kind of executive officer of their governments. That was more than a change in the quality of the possession, it was a change in its nature. With this analysis Kerr LJ agreed.

It is, however, hard to see such a clear distinction. In *Mandarin Star* the master took possession of the cargo as employee and agent of the shipowner, acting under directions given by the time-charterer (who took freight from the cargo-owners) holding the goods to the ultimate benefit of the cargo-owner. Off Kobe he continued to hold as servant and agent of the shipowner but the directions issued to him were changed. In *Rickards v Forestal* the masters took possession in similar terms and directions issued to them were also changed. Their employers, it was assumed in the case, did not dissent from those new instructions, being loyal citizens of their country. It might colourably be argued that the only difference was that in *Rickards v Forestal* the shipowners changed the orders in order to comply with government policy while in *Mandarin Star* they did it in pursuit of a mistaken claim of right.

Lord Denning, 'under his breath', and calling in aid Galileo as a brother heretic, (at 1064 a) was prepared to hold that he was not bound by *Mandarin Star* because it was wrong. Kerr LJ too, clearly did not think that it was right (see 1065–7). 'Takings at sea' had before *Mandarin Star* never been considered as applicable within the maritime trio of ship, cargo and freight. The policy as originally designed had been for the whole adventure, did not 'SG' stand for 'ship and goods'? 'Takings at sea' ought to be confined to attacks from outside as 'thieves' had been confined to 'assailing thieves'.

May LJ took the opposite view. He was not prepared to consider *Mandarin Star* to have been decided per incuriam or wrongly decided.

The court was, however, unanimous in distinguishing the case, but not in their grounds for distinguishing it. For Lord Denning, the taking had occurred at Mina al Ahmadi. Not a voluntary transfer of possession but, in unrepentant use of old terminology, 'larceny by a trick'. May LJ disagreed. At that point, all the conspirators had was 'mischievous intent', since there remained matters to be settled. For him, the taking occurred at the single buoy mooring off Durban. Kerr LJ was prepared to accept both as possibilities. All agreed the alteration of course was insignificant and that neither

of the places they did favour was 'at sea', thus dissenting (as regards Durban) from Mustill J and in somewhat robust terms (at 1069 a, 1074 e). A ship, it would seem, is either at sea or in harbour: if unloading or loading it must be in harbour.

Then the scuttling. Lord Denning and Kerr LJ agreed that clause 8 was effective to overrule *Samuel v Dumas*, the latter commenting that 'marine policies must be construed sensibly' (1071 b) May LJ thought the question open to 'substantial doubt' but based himself upon the concession made by the underwriters. All agreed with Mustill J on the causation point, although since there was no 'taking at sea' the aggregation issue did not have to be decided and May LJ made it clear that the loss off Senegal was not 'caused' at Durban.

One final point was raised. If clause 8 was effective to make a scuttling into a 'deemed peril of the sea' could not equivalent argument be made that it might make the events at Durban a 'deemed barratry'? If the shipowners had not misconducted themselves, the action by the master in discharging his cargo would surely have been barratry. But the court would have none of it. When shipowners are involved there can never be barratry. This conclusion must be applauded. The intentions of the draftsmen of clause 8 and of its users were to overrule *Samuel v Dumas*, not to cover 'deemed barratry'. Yet the logic of the distinction remains elusive.

For cargo, in the London market, the Lloyd's SG form will not be available in future. How would the plaintiff have fared under the Institute Cargo Clauses 1982? ICC 1982 offers three forms, 'A', 'B' and 'C'. Form 'A' is roughly equivalent to the old Institute All Risks cover, which have been available to cargo owners since 1963 and which was not linked with the Lloyd's SG form. There are differences in that exceptions under the new form would seem to be greater. Forms 'B' and 'C' cover named perils but these are all expressed in terms of factual situations, events, rather than types of behaviour. 'Takings at sea' and 'barratry' have disappeared. So has 'perils of the sea'. There is no phrase which seems apt to cover events at Durban. The scuttling, however, would seem to be covered, prima facie, by the inclusion of the 'sinking' of the vessel.

All three new forms, including Form 'A', are subject to exceptions. There is no general exception for the fraudulent acts of third parties but clause 4.7 exludes cover for 'deliberate damage to or deliberate destruction of the subject-matter insured . . . by the wrongful act of any person . . .' An exclusion which would apply to scuttling but probably not to deliberate discharge of cargo. Clause 4.7 may be excluded, upon terms, and if it is it may be replaced by the Institute Malicious Damage Clause which, in addition, will cover the acts of malicious, as well as fraudulent, persons.

Whether innocent cargo owners should have insurance coverage against maritime fraud may well be thought to raise issues of significance. If they are to have it, *Salem* perhaps points out some of the difficulties in granting it.

Postscript

Shell appealed, and the underwriters cross-appealed, to the House of Lords (see [1983] 1 All ER 745). In a single speech by Lord Roskill, with which Lord Brandon was associated, the decision of the Court of Appeal was affirmed

and *Mandarin Star* expressly overruled. Also affirmed was the decision that barratry could only be committed against the shipowner, that clause 8 was effective to deem scuttling a peril of the sea but not to deem stealing the cargo barratry.

2 The Hollandia

The unification of private law rules, in particular those relating to the carriage of goods by sea, must provide an apt battleground both for practitioners and for academics. Since the achievement of uniformity can hardly stand with freedom of contract, the debate begins with an intractable policy issue. The techniques required for effective uniformity among sovereign legislatures and judiciaries can never be simple. The device adopted for the international promulgation of the Hague Rules 1921 was sometimes described as the 'clause paramount' technique. For example, the UK Carriage of Goods by Sea Act 1924 provided (s 1) that the Rules shall 'have effect' in respect of all outward bills of lading while s 3 required all such bills to contain a clause incorporating the Rules.

In 1939 the Privy Council in *Vita Foods Products Inc v Unus Shipping Co Ltd* [1939] 1 All ER 513 decided that a similar provision in the Newfoundland Carriage of Goods by Sea Act 1932 could effectively be avoided by the insertion in the bill of lading of an English choice of law clause. Since the voyage was from Newfoundland to New York, the Hague Rules would not, by English law, be applied, since the bill of lading was in no way an English outward bill. Thus Article III (8) of the Rules, which declared that attempts to reduce liability below the levels fixed by the Rules should be null and void was avoided. In so doing, the Privy Council did not follow, and cast huge doubt upon, the decision of the Court of Appeal in *The Torni* [1932] P 78, [1932] All ER Rep 374.

Vita Foods might be regarded in more than one way. It might be thought that the enactment of the Rules was not widely enough drafted to prevent an exclusion clause cast in the form of a foreign jurisdiction clause. It might be seen as the application of the principle, of private international law, that the law of Newfoundland could only apply to Newfoundland contracts, and a contract with an English choice of law clause was, by definition, not a Newfoundland contract. In any event, it clearly rendered the clause paramount technique, or any technique whereby the Rules were to be given legal effect as contracts only, unreliable.

The Hague Rules were amended by protocol in 1968 and the result, called the Hague-Visby Rules was enacted in the UK by the Carriage of Goods by Sea Act 1971. The Hague-Visby Rules apply not only to outward bills but also to bills issued within the jurisdiction and to bills which incorporate the Rules. The clause paramount technique is not used. Instead, by s 1(2) of the Act, the Rules are to 'have the force of law'. Whether this new technique is more effective than the old was much debated. Among others, Dr FA Mann and Dr JWC Morris took up the cudgels, the former arguing that the 1971 provision would not prevent the operation of an appropriate choice of law clause, the latter taking the opposite view (see (1973) 46 BYIL, (1979) 95 LQR 59, 346).

The 1971 Act came into force in June 1977. On 21 March 1978 a large road-laying machine was shipped at Leith for Bonaire in the Netherlands Antilles. On arrival it was dropped and damaged. The ensuing litigation, *The Hollandia* [1982] 1 All ER 1076, CA, 3 All ER 1141, HL (see also [1981] 2 Ll Rep 61 (Sheen J)) provided the English courts with their first opportunity to consider the matter.

The cargo was shipped aboard a vessel belonging to the Royal Netherlands Steamship Co, the carriers, who issued, in the UK, a through bill of lading providing for transhipment at Amsterdam. The cargo was transhipped aboard a Norwegian vessel. The bill of lading incorporated Dutch law and provided for the exclusive jurisdiction of the Amsterdam court. At the appropriate time, the Hague-Visby Rules had not been enacted by the Netherlands Legislature and, as was stated in the bill, the governing law was the old Hague Rules. The limitation levels under the two systems are different. Under the Hague Rules the cargo-owners, who claimed to have been damaged to the extent of £22,000, stood to recover £250: under the Hague-Visby Rules, about £11,500.

Cargo-owners, by taking sister-ship proceedings *in rem*, were able to get the carriers before the English Admiralty Court. There the defendants asked the judge to stay the proceedings, on the ground of the foreign jurisdiction clause. This Sheen J did. From that decision the cargo-owners appealed to the Court of Appeal which unanimously lifted the stay. On a further appeal the House of Lords unanimously affirmed the decision of the Court of Appeal.

The unanimity was repeated in the reasoning. All four of the appeal judges who gave substantial judgments (Lord Denning MR, Sir Sebag Shaw, Ackner LJ and Lord Diplock) approached the problem in the same way. As Ackner LJ said, the appeal raised 'a short but difficult question of construction concerning the Carriage of Goods by Sea Act 1971' (see p 1082 g). None had any doubt that the effect, on any interpretation, of s 1(2) of the Act was to make the Hague-Visby Rules part of the statute and binding upon the courts in the same way. Lord Denning used the analogy of EEC legislation (see p 1079 j) and Sir Sebag Shaw pointed out that if the purpose of the subsection was to give the Rules *contractual* effect, then its enactment was unnecessary (see p 1081 h). By declaring to which bills of lading the Rules shall apply the Act has, in effect, overriden any other UK private international law rules. The bill of lading in the case was a 'United Kingdom' bill, whatever its own clause 2 said on the matter.

That being so, the next question was whether clause 2 of the bill was rendered 'null and void and of no effect' in virtue of the pleonastic Article III(8) of the rules (which provision has in no material respect changed from the equivalent provision in the old Hague Rules). Article III(8) applies to

> 'any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules'.

Clause 2 of the bill had three paragraphs. The first applied to the bill 'the law of the Netherlands in which the Hague Rules . . . are incorporated'. The second declared that 'the maximum liability per package is Dfl 1250'. The third declared that 'all actions . . . shall be brought before the Court of

Amsterdam and no other Court shall have jurisdiction . . . unless the Carrier appeals to another jurisdiction or voluntarily submits himself thereto'.

At first instance Sheen J had held the three paragraphs severable and further that Article III(8) struck down only the second, leaving both choice of law and exclusive jurisdiction sub-clauses intact. In the Court of Appeal, Ackner LJ and Sir Sebag Shaw held that the choice of law paragraph was also struck down, since the effect of applying Dutch law would be to apply the old Hague Rules with their lower limits. For the same reason, to hold the paragraphs severable was 'unreal'. But Lord Denning and, in the House of Lords, Lord Diplock went further. The third paragraph, the exclusive jurisdiction sub-clause, even taken by itself offended against Article III(8). Lord Diplock adopted a broad canon of interpretation. Article III(8) was to be applied to 'every provision in a contract of carriage which, if it were applied, would have the effect of lessening the carrier's liability' (see [1982] 3 All ER p 1146 d–j, p 1147 a–f).

Such a broad interpretation, his Lordship recognized, did not render exclusive jurisdiction clauses *ex facie* void. There might be occasions when their operation did not have the prohibited effect of lessening liability. In such cases, it would be for the court to examine the particular circumstances to see whether the clause survived.

The Hollandia is not a complicated case. In academic terms, it might be said to mark a victory for Dr Morris. In practical terms, while it increases certainty by making it clear that the Carriage of Goods by Sea Act 1971 applies as it says it applies whatever the bills subject to it say for themselves, by introducing some limited 'wait and see' element it must also decrease certainty.

3 The Irene's Success

The year 1982 may well be remembered as the year in which liability for negligently inflicted economic loss was re-examined. This was done by the House of Lords in *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 201, a case which could by no stretch of definition be described as a shipping case. Lord Roskill, in the leading speech of the majority, carried out a wide-ranging analysis of the development of the law of negligence since *Donoghue v Stevenson* [1932] All ER Rep 1 in order to identify the principles upon which duties of care should be based. This enabled him to find that a sub-contractor who laid a faulty floor whereby the occupier of the building suffered consequential economic loss owed a duty of care to that occupier whereby he might be made liable for that loss.

As a matter of strict precedent, *Junior Books Ltd v Veitchi Co Ltd* may perhaps be limited to the manufacture of faulty articles or the carrying out of inept repair or other work on such articles. As such it may be distinguishable from the paradigm economic loss problem in shipping—can the cif buyer who happens not to be a holder of a bill of lading, and therefore to be without contractual remedy, sue in tort the carrier who has negligently damaged his cargo? Although the risk of such loss is with him, as against his vendor, he has no title and his loss, therefore, is classified as economic loss.

Such a case was *Margarine Union GmbH v Cambay Prince Steamship Co Ltd, The Wear Breeze* [1967] 3 All ER 775. The plaintiffs held a delivery order in

respect of part of a bulk cargo of copra shipped aboard the Wear Breeze and sold cif. The risk was with them but they would acquire no title until the cargo was discharged and appropriated to the various delivery orders. When the hatches were opened the copra was found to be infested due to the negligence of the defendants in not properly fumigating the holds of the vessel. After an exhaustive review of the case law going back to *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453, [1874–80] All ER Rep 220, Roskill J, relying substantially upon *Weller and Co v Foot and Mouth Disease Research Institute* [1965] 3 All ER 560, held there to be no duty of care owed to the plaintiff in respect of this purely economic loss.

Eleven months before the decision of the House of Lords in *Junior Books Ltd v Veitchi Co Ltd*, Lloyd J in the Commercial Court was invited on a preliminary issue to consider whether, in the light of the subsequent development of the law, *The Wear Breeze* might be reconsidered. The material facts of *Schiffart and Kohlen GmbH v Chelsea Maritime Ltd, The Irene's Success* [1982] 1 All ER 218 were identical with those of *The Wear Breeze*. The plaintiffs were cif buyers of a cargo of coal damaged in transit but were not holders of a bill of lading. Loyd J carried out a review of the case law and of the developments in the law, before and after *The Wear Breeze*, and concluded that 'if *The Wear Breeze* were being decided today it would be decided differently' (at 224 b).

Since 1967 there had been two decisions of the House of Lords in which the general principles of the law of negligence have been considered in broad terms. These were *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294 and *Anns v Merton London Borough Council* [1977] 2 All ER 492. These established that the correct approach to the vexed question of the establishment of a duty of care was first to ask whether there was sufficient 'proximity' between defendant and plaintiff. That requirement was satisfied if it could be said that the defendant ought reasonably to have contemplated that carelessness would cause damage to the plaintiff. Satisfaction of the proximity requirement produced a prima facie duty of care. The second question was whether there was any good policy reason for negativing or reducing that prima facie duty.

Applying these principles to the relationship between carrier and cif buyer, Lloyd J found no difficulty in establishing proximity. Carriers knew that cargoes were commonly sold. Carriers also knew that damage to the cargo would cause loss to the person at whose risk the goods were. Such a person would usually be the holder of a bill of lading, but would not necessarily be so. Should that prima facie duty be displaced? There were two arguments to be considered. The first was the 'floodgates' argument, classically expressed by Cardozo CJ in *Ultramares v Touche* (1931) 174 NE 441 at 444, that defendants should not be exposed to 'a liability in an indeterminate amount for an indeterminate time to an indeterminate class'. The floodgates argument no longer seems to be very convincing (see per Lord Roskill in *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER at 209 a) and Lloyd J had little difficulty in demonstrating its inapplicability to this type of case. The class of plaintiffs if severely circumscribed: they are cif purchasers of cargo (see p 221 h).

The second reason for not imposing a duty of care is not quite so simply stated. It is that to allow actions in tort among those engaged in the operation

of carriage of goods by sea might adversely affect regimes distributing risks and liability, such as the Hague Rules, which operate by way of contract. This is a difficult problem and it has arisen before, in circumstances not involving claims for pure economic loss. *Scruttons Ltd v Midland Silicones Ltd* [1962] 1 All ER 1 and *New Zealand Shipping Co Ltd v Satterthwaites, The Eurymedon* [1974] 1 All ER 1015 are cases which involved the same issue: whether limitations contained in the Hague Rules might be avoided by taking appropriate 'third party' proceedings in tort. On a preliminary point, Lloyd J was not, of course, required to form a concluded opinion on such a complex matter. He did not. He 'tentatively' expressed the view that such an argument was insufficiently strong to displace liability in circumstances in which defendant and plaintiff were so closely related. It would seem likely that this issue will have to be re-examined on some future occasion. However difficult it may be to express the distinction, it is clear that the development of tort liability for pure economic loss must reach a point where the overlap with contract presents problems. One such has been adverted to several times in the cases: to what extent should a tort plaintiff be entitled to compensation for loss of bargain? Should Mrs Donoghue have an action if the ginger-beer bottle contained water? (See per Stamp LJ in *Dutton v Bognor Regis United Building Co* [1972] 1 All ER 462 at 489 and per Lord Roskill in *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER at 211). This is not a mere antiquarian concern with forms of action. There must be a difference between the law's function in giving effect, within appropriate limits, to allocations of entitlements and risks undertaken and agreed to for good consideration, and the compensation of those injured by the irresponsible behaviour of others.

The rest of Lloyd J's judgment is devoted to a careful analysis of *The Wear Breeze* in which he concludes that its principles are not such as are clearly secure from reconsideration in the light of the developments in the law of tort since 1970. He therefore decided the preliminary issue in favour of the plaintiffs.

It is surely ironic that Lord Roskill was not afforded the opportunity of himself reconsidering the position he had taken in *The Wear Breeze* some 15 years ago. It is also noteworthy that the careful re-examination carried out by Lloyd J displays no discernible difference in principle from the approach adopted by Lord Roskill in his speech in *Junior Books Ltd v Veitchi Co Ltd.*

4 The Emmanuel Colocotronis (No 2)

In *Astro Valiente Compania Naviera SA v Pakistan Ministry of Food and Agriculture (No 2), The Emmanuel Colocotronis (No 2)* [1982] 1 All ER 823 Staughton J in the Commercial Court was presented with another point in the continuing debate about the relationship between charterparties and bills of lading.

If a cargo-owner wishes to use all the space in a ship his best choice of contract is a charterparty. Some types of cargo-owners, for example grain exporters, will commonly charter vessels in this way. In such a case the contract of carriage is to be found in the charterparty. But charterparties, as against bills of lading, have a serious disadvantage. They are not negotiable documents of title. If the exporter wishes to deal with the cargo before it arrives at its destination, as he generally will, he will need to issue a bill of lading.

The carrier for his part, will wish to be assured of his position. Having negotiated the charterparty, being aware that bills of lading are to be issued, he has to see that the position he negotiated with the charterer, as reflected in the terms of the charterparty, is not affected if he has to face a cargo receiver, the holder of a bill of lading. The charterparty will therefore contain terms requiring the bills of lading to incorporate the terms of the charterparty and the bills themselves, if issued in conformity with the charterparty, will include appropriate words of incorporation.

The issues will generally arise when the receiver is in dispute with the carrier. The question, put simply, at this point is: to what extent is the receiver, as bill of lading holder, bound by the terms of the charterparty? Unfortunately the simple question does not receive a simple answer. We are in an area of commercial drafting where, on the one hand, words acquire special meanings as terms of art and, on the other, redundant and imprecise expression abounds. In *Emmanuel Colocotronis (No 2)* some 24 authorities were referred to by Staughton J to decide what to any but a shipping lawyer would have seemed to be a relatively straightforward point of contractual interpretation.

The question was whether the receivers were obliged to arbitrate. The charterparty, Baltimore Berth Grain Form C, contained 19 printed clauses, of which eight had been deleted, and 18 typed clauses, numbered sequentially. Clause 9 was a London arbitration clause, requiring claimant's arbitrator to be appointed within nine months on pain that the claim would otherwise be 'deemed to be waived and absolutely barred'. The bill of lading contained the simple phrase: 'all other conditions, exceptions, demurrage, general average and for disbursements as per above named charterparty'.

If clause 9 was anything, it was a 'condition'. Some argument was addressed to Staughton J that it might be an 'exception', in that it contained a time-bar, but his Lordship had no difficulty in desposing of that. The time-bar might be an exception but the sub-clause was clearly not severable and, taken as a whole, the arbitration clause was not an exception. It was about the word 'condition' that the authorities clustered. Leaving to one side those concerned with bills that were inconsistent with charterparties, for there was no doubt about consistency in the present case, Staughton J described the rest as being on 'the description issue': 'are the words of incorporation apt to describe the clause sought to be incorporated?'.

Older authority tended to support the proposition that a word such as 'condition' would incorporate into the bill only such conditions of immediate application to a bill of lading holder, such as payment of freight and demurrage etc. *T W Thomas and Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1, a House of Lords decision within that line of authority, held that that word 'condition' was not apt to incorporate an arbitration clause. Later cases, however, were more favourable. *The Merak* [1956] 1 All ER 230, *The Annefield* [1971] 1 All ER 394 and *The Rena K* [1979] 1 All ER 397 all draw a distinction between arbitration clauses in charterparties which can only be understood as relating to disputes arising out of the charter and clauses which expressly (or perhaps also by implication) cover disputes arising out of the bills also. The former type of clause is not incorporated into bills of lading by general words such as 'condition'.

Staughton J was prepared to take the process a little further. Although the arbitration clause did not in its terms cover disputes arising out of the bill of lading, the provision in the charterparty dealing with the issue of bills under it clearly required that those bills incorporate the arbitration clause. The judge was satisfied that, having been directed to the charterparty by the general words of incorporation ('conditions') the holders of the bill of lading must necessarily understand, on reading the whole of that document, that the arbitration clause was to be incorporated.

In these terms, the decision in *Emmanuel Colocotronis (No 2)* appears narrow and technical. Staughton J is, however, quite clear about the wider policy considerations involved. At the end of his judgment he quotes, with implicit disapproval, the well-known dictum of Devlin J in *Peter Cassidy Seed Co Ltd v Osuustukkukauppa IL* in which that judge had made a disparaging comparison between the 'expensive and lengthy' procedure of arbitration and the speedy service offered by the Commercial Court. Since then Staughton J points out, there has been a change in policy.

> 'But the change does not lead to the conclusion that the parties to a bill of lading have, as a matter of construction, incorporated a London arbitration clause. It merely shows that, if they have done so, English public policy will treat their decision with approval, rather than disapproval as in the past' (at 833 h).

Such a distinction, though proper, is perhaps somewhat fine.

5 The Evia

The Shatt al Arab is a waterway at the head of the Persian Gulf leading to Abadan, Khorranshahr and Basrah. In part it marks (or used to mark) the boundary between Iran and Iraq and, in happier days, was jointly administered by those two countries. There are now some 80 vessels trapped in the Shatt al Arab due to the outbreak of war between Iran and Iraq on 22 September 1980.

This situation has given rise to much litigation. In *The Bamburi* [1982] 2 Lloyd's Rep 312 (a judicial arbitration by Staughton J) the insurance position, both as to cover and as to loss, was considered. A series of cases have examined the impact of the declaration (by insurers) of the northern end of the Persian Gulf as an Additional Premium Area which occurred as early as August 1979, and the consequential need to pay not only for ordinary war risk cover but for additional 'blocking and trapping cover', on time charterers under New York Produce Exchange and Beepeetime charters (*The Athos* [1981] 2 Lloyd's Rep 74, *The Antaios* [1981] 2 Lloyd's Rep 284, *The Oinussian Virtue* [1981] 2 Lloyd's Rep 300, *The Taygetos* [1982] 2 Lloyd's Rep 272, *The Apex* [1982] 2 Lloyd's Rep 407). All cases held the premiums to be at charterer's account.

Kodros Shipping Corpn v Empresa Cubana de Fletes, The Evia [1982] 3 All ER 350 raises different issues, issues which are, perhaps, of wider significance. *The Evia* was on an eighteen-month charter in Baltime form due to expire on 20 May 1981. In mid-March 1980 charterers ordered her to Basrah. She arrived, discharged her cargo and was ready to leave at 1000 hours on 22 September 1980. War broke out and she was unable to leave. Hire had been paid up to 4 October 1980 but charterers refused further hire, claiming that

the contract was frustrated. The matter was referred to arbitration and decided by Mr Basil Eckersley QC as umpire. From his decision an appeal was taken to the Commercial Court (Robert Goff J [1982] 1 Lloyd's Rep 613), thence to the Court of Appeal (Lord Denning MR, Sir Sebag Shaw and Ackner LJ [1982] 1 Lloyd's Rep 334) and finally to the House of Lords.

The charterparty contained two relevant clauses. Clause 2 required that the vessel be employed only 'between good and safe ports'. Clause 21 prohibited the sending of the vessel into a war zone without prior consent of the owners and obliged the charterers to pay the costs of insurance and modified the 'off-hire' clause, so that, if delayed in a war zone in circumstances under which hire would under that clause generally cease to be payable, it should nevertheless remain payable. It was (eventually) common ground that Basrah was safe when the Evia was ordered thither and safe when she entered the port. It was also the fact that the shipowners had agreed to the order that she proceed to Basrah, which was admittedly a war zone within the meaning of clause 21 at all relevant times.

Applying the principles established by the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] 1 All ER 161 (and later *The Nema* [1981] 2 All ER 1030) neither the arbitrator nor any of the judges had any real difficulty in holding the contract to have been prima facie frustrated on 5 October 1980. The main argument, however, centred on whether the effect of that 'frustration' would have to be modified by reason of the terms of the contract.

In essence, two points were made. First, that the provisions of clause 21 had effectively allocated risk with regard to war so as to leave no room for the operation of the doctrine of frustration. Robert Goff J considered that clause 21 dealing, as it did, only with insurance and the 'off-hire' clause did not so completely deal with the risk of war as to exhaust the operation of the doctrine of frustration. This conclusion was not dissented from in the Court of Appeal or the House of Lords.

The second point was the more difficult. Clause 2, it was accepted, imposed upon the charterer an obligation not to order the vessel to an unsafe port. The question was: was this so-called 'warranty of safety' a continuing obligation, absolute in its nature, which would render the charterers in breach despite the fact that Basrah was safe in March, when the Evia was ordered there, and in July when she arrived, because it was certainly unsafe when she was ready to leave on September 22? In this context, at all levels, much reliance was placed upon a dictum of Sellers LJ in *Leeds Shipping Co v Societe Francaise Bunge, The Eastern City* [1958] 2 Lloyd's Rep 127 at 131: 'a port will not be safe unless . . . the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger . . .' At first instance, Robert Goff J, relying upon a line of first instance cases which began with *The Evaggelos TH* [1971] 2 Lloyd's Rep 200 and culminated in the decision of Mustill J in *The Mary Lou* [1981] 2 Lloyd's Rep 272, held the charterers to be in breach. The words should be given a simple meaning. 'Abnormal occurrence' could be applied in one of two ways: as meaning that, at the time the order was given and some prediction was necessary, normality was to be assumed, and as excluding dangers which could not be said to be risks of the port. War was a risk of Basrah: other events (lunatic arsonists who board ships to set them alight were discussed) might be regarded as 'abnormal occurrences'.

In the Court of Appeal, the majority (Lord Denning MR and Sir Sebag Shaw) disagreed. Lord Denning took the view that war *was* an 'abnormal occurrence'. This was not because war was unlikely in the region at that time. That could hardly have been argued. It was rather that the safety of a safe port had to be confined to matters affecting the port as a facility and an undertaking. 'Abnormal occurrences' were events 'unconnected with the set-up' of the port. Sir Sebag Shaw agreed. A safe port was one which was safe in its 'physical, natural, intrinsic attributes'. The effect of the decision of the majority would be to take from the ambit of the safe port obligation all considerations of so-called 'political safety', which might be thought to be at least as important, in practical terms, as ice, foul weather and silting.

In the House of Lords there was one major speech. It was delivered by Lord Roskill, but he declared that Lord Brandon had assisted in its preparation. In addition, Lord Diplock offered some 'supplementary observations' (see per Lord Keith at 435 h). Lord Roskill was at pains to put the dictum of Sellers LJ in *The Eastern City* into its proper context. That case and others before it had not concerned the nomination of a port which was safe at the time of nomination but one which was always inherently unsafe. The matter for decision had been whether such a nomination had amounted to a breach by the charterers, sounding in damages, or to a mere nullity, a direction which did not have to be complied with by the shipowner. The cases held that such a nomination amounted to a breach. The line of decisions culminating in *The Mary Lou* were not justified by previous authority and they were wrong. Lord Diplock further characterised them as 'heresy' and warned against the 'misuse' of judgments, especially those reported in 'a specialised series of reports' (at 354 d–f).

But the House did not adopt the solution preferred by the majority of the Court of Appeal. The safety of a port was not to be confined to its 'intrinsic attributes' or to its 'set-up'. 'Political unsafety' was included. Lord Roskill took the opportunity to consider the question from first principles. The 'contractual promise' (the word 'warranty' was carefully eschewed) could only be made when the nomination was made. That promise had to be understood as referring to the prospective safety of the port. Looked at from that moment, assuming normality, was the port likely to be safe when the vessel arrived, used it and left? Using this approach, the characters committed no breach when they nominated Basrah. It was a safe port at the time of nomination and, disregarding abnormal occurrences, likely to remain so. It was a war zone, but still a safe port. Ships could use it and leave. When the shooting started on September 22 it ceased to be a safe port. Vessels could neither enter nor leave.

That was sufficient to dispose of the appeal, but Lord Roskill saw as his task the full exploration of this branch of the law. He went further. He was prepared to apply this obligation, subject to any express stipulation, to a voyage charterparty. However, since the voyage charterer had no continuing power over the ship, as had the time charterer, there was no room for subsequent 'secondary obligations' on the voyage charterer.

A time charterer could be further obliged, however. If he nominated a port which was safe when nominated but subsequently became unsafe, in that he retained power to re-direct the vessel or order it to leave port before time, he could be regarded as in breach if he did not so act. Clearly without reaching a

final conclusion on the point, Lord Roskill was ready to consider that the 'contractual promise' might be interpreted as requiring the time charterer to do 'all that he can effectively do to protect the ship'. Even on that account, the charterers of the Evia were free from liability. They had no time.

Finally, Lord Roskill turned to clause 21. He considered the question whether that clause ought to be read as cutting down the obligation as to safe ports imposed by clause 2. He agreed with Lord Denning and Sir Sebag Shaw that the charterparty must be construed as a whole and, so doing, concluded that clause 21, giving, as it did, an absolute veto to the shipowners in respect of war zones, rendered a nomination of a war zone port, with prior consent of the shipowners, not to be a breach of the safe port promise in that respect.

With this final point it is possible to take issue. Clause 21 is substantially to do with war risk insurance. Basrah had been an additional premium area, and therefore a war risk zone, for some five months before the nomination was made. Such a risk may be high or it may be low. It is certainly possible, whatever the facts in *The Evia*, for there to be a wide disparity between the risks of war rendering a port 'unsafe' and the risks perceived in sending a vessel into a war zone. The immediate, and inescapable, effect of entering a war zone is that higher insurance premiums will be demanded. That, clearly, is a matter of great importance in clause 21. It can, therefore, be questioned whether in all cases the operation of clause 21 would avoid liability under clause 2. Suppose in *The Evia* itself it had been possible for the charterers to order the vessel to leave Basrah in time and they had not, could not that have been a breach?

The Evia is an important decision. It has provided us not only with the settlement of a difficult point of the law of charterparties but it has done so in terms of general principle. Lord Roskill's speech must now be the baseline for all future discussion of the 'contractual promise' regarding a safe port.

Solicitors

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Introduction

Solicitors' interests in the litigation reported in the All England reports during 1982 are, in a sense, comprehensive. Almost every reported case involves a decision by the litigation department of the appropriate firm to pursue an issue, which by definition is in doubt, through the lottery of the courts. No doubt fortified by counsel's opinion the client in each reported case should be congratulated on his resolution and courage. Unless assisted by the legal aid fund, litigation is a luxury which few can afford, as chapter 12 of the Royal Commission on Legal Services (1979) makes clear. It is therefore worth a few moments' reflection considering the huge volume of litigation which takes place annually, following a positive decision to go to court by solicitors and barristers, and that it is, of course, only a minute percentage of these cases that find themselves in the law reports.

The orientation of this article is rather different. We are concerned here with those cases where solicitors as such are either parties to litigation or intimately concerned, as solicitors, with the result thereof. It seems appropriate to start the article with an account of the proceedings brought against the Law Society by Mr Swain (a London solicitor) and his co-plaintiff, Mr McLaren (a Somerset practitioner), with the primary object of obtaining a declaration that the Law Society's insurance indemnity scheme, compulsorily imposed upon the profession, did not conform to the requirements of the Solicitors Act 1974. A subsidiary objective of the litigation, which became important in the House of Lords hearing in 1982, was, assuming that the scheme was in fact intra vires, whether the Law Society should be accountable for the commission which the Law Society shared with the brokers.

Swain v The Law Society [1982] 2 All ER 827

The Royal Commission on Legal Services (para 3.11) neatly describes the history of the Law Society as follows:

> 'Until 1831, the leading professional association of Solicitors was the Society of Gentlemen Practisers but in that year a Royal Charter was granted which created the Law Society. A second Charter granted in 1845 defined the objectives of the Society as "promoting professional improvement and facilitating the acquisition of legal knowledge". These remain its objects today. The powers of the Law Society are derived from legislation and in the past 150 years considerable responsibilities have been imposed on it by Parliament.'

Lord Diplock in his speech (p 829) identified a fundamental problem which has been troubling some members of the solicitors' profession for many years. This is the dual role of the Law Society. As Lord Diplock explained, in

performance of its functions the Law Society acts in two distinct capacities: a private capacity as the successor to the Society of Gentlemen Practisers; and a public capacity as the authority on whom, or on whose Council elected in accordance with the provisions of the Charter, various statutory duties are imposed and powers conferred by the Solicitors Act 1974. As is well known, membership of the Law Society by solicitors is voluntary. Some 10% of practising solicitors are not members and over these the Law Society, acting in its *private* capacity, can exercise no coercive powers.

However, the other side of the coin presents a very different aspect. The Solicitors Act 1974 imposes on the Law Society a number of statutory duties in relation to solicitors whether they are members of the Law Society or not. These duties are primarily comprised in Part II of the 1974 Act. In particular ss 35, 36 and 37 are crucial. Section 35 is the intervention section, and enables the Council of the Law Society to step in where the solicitor's practice is thought to be under unsatisfactory control. Section 36 requires the Law Society to maintain, by means of contributions and levies, a compensation fund. Section 37, the material one in this case, empowers the Law Society to establish a scheme of professional indemnity to cover solicitors directly, and therefore their clients indirectly, against loss resulting from negligence and the like on the part of solicitors and their employees.

The two major speeches in the House of Lords, those of Lord Diplock and Lord Brightman, both emphasise this public duty of the Law Society. It is, in effect, a duty which could be correctly classified as being part of consumer protection law. The power to make 'indemnity rules' providing for the indemnity of solicitors against professional liability by establishment of a mutual fund was introduced by the Solicitors (Amendment) Act 1974. The mischief against which the rules are aimed was no doubt the alleged inadequate cover under which some firms operated (or possibly had no cover at all) and the damage to the reputation of the profession where a solicitor was unable to meet a judgment against him owing to inadequate insurance cover. Section 37 came into force on 1 May 1975. On 12 December 1975 the council of the Law Society, with the concurrence of the Master of the Rolls, made the Solicitor's Indemnity Rules 1975. These rules authorised the Law Society to take out and maintain a master policy in the form set out in the schedule, and to arrange for the issue to 'solicitors to whom these rules apply' of certificates of insurance in the form there set out. The provisions of the master policy were therefore expressed to form part of the statutory rules. Rule 3 requires solicitors to pay the premiums payable by them under the master policy and certificate of insurance as they fall due. Compliance with the rules so established is enforced by s 1 of the Act, in that a person is not qualified to act as a solicitor unless he has a practising certificate in force; and s 10 then goes on to state that the Law Society shall not issue a practising certificate unless it is satisfied that the applicant is complying with any indemnity rules or is exempt from them.

The main issues

The main issues in this litigation can be expressed quite simply. Firstly there was the issue whether the indemnity rules were properly made in exercise of the Law Society's powers conferred by s 37 of the 1974 Act. Though this

issue was vigorously contested in the High Court and the Court of Appeal, the rules were conceded as being intra vires by the respondent in the House of Lords. The second issue, which Mr Swain allowed the Law Society to pursue in the House of Lords (though it was made clear that he would not have argued the point at his own volition) was essentially whether the Law Society could keep the brokerage on the master policy, amounting in 1978 to some £648,000, for its own professional purposes, or whether it should account for this sum to those solicitors who paid premiums under the master policy.

As stated above, it was with this second issue that the House of Lords appeal was exclusively concerned. In arriving at the conclusion that the Law Society had no duty to account for the money, their Lordships made it clear that the powers, obligations and duties which failed to be considered were part of the *public* duties of the Law Society, not part of its private powers and duties as a professional association. This point was regarded as being crucial since the Law Society, with regard to the operation of the indemnity rules, were fulfilling a statutory duty imposed by the 1974 Act. In other words, the Law Society was acting in its 'public' capacity rather than its 'private' capacity.

The Court of Appeal decision

The Court of Appeal had regarded the matter rather differently from the way the House of Lords eventually decided. The material facts had been that in 1975, when the 1974 Act came into force, the Law Society circulated a summary of the main features of the indemnity scheme. The fact that the Law Society intended to secure a share of the brokerage commission paid to the London Insurers Brokers Ltd under the master policy was clearly disclosed in papers circulated within the profession. A commission income of some £250,000 per annum was estimated and it was stated that 'the benefit of the net excess receipts will insure for the profession as a whole'.

The Court of Appeal was unanimous in the conclusion that the Law Society had constituted itself a trustee of the benefit of the master policy contract. Crucial to this finding of the Court of Appeal was clause 1 of the master policy which provided as follows:

> 'the insurers agree with the Law Society on behalf of all Solicitors from time to time required to be insured by Indemnity Rules made under section 37 of the Solicitors Act 1974, and on behalf of former Solicitors, to provide such insurance in accordance with the terms of the certificate attached hereto. . . .'

The words '*on behalf of*' etc were taken by the Court of Appeal as a declaration of trust with the consequences that the Law Society held the benefit of the master policy on trust for those solicitors designated by the rules as persons required to be insured. Having decided the existence and trusteeship, the Court of Appeal concluded that the Law Society was accountable for the commission it received under the agreement with the brokers. Moneys received prior to 1979 were excluded in that no challenge had been made to the Law Society until then and the Law Society had irrevocably altered its position on the footing that no objection was being taken to the validity of the scheme.

The House of Lords disagrees

Lord Brightman conceded that if the Court of Appeal were correct in concluding that the Law Society had constituted itself a trustee of the master policy, he would not for his part dispute the conclusion that the Law Society must account to the premium payers for its share of commission. The crucial issue was, therefore, whether the Law Society did indeed constitute itself a trustee of the master policy contract.

As can be seen, the Court of Appeal put much reliance on the interpretation of the words 'on behalf of . . .'. These were alleged to be prima facie words of agency or trust. Since agency could not exist on the facts of this case they must, if anything, be read as words of trust. However in the view of the House of Lords this conclusion was false. As Lord Brightman stated

> '. . . the words "on behalf" clearly do not *express* a trust, and they do not necessarily *imply* a trust. . . . It would, indeed, be surprising if a society of Lawyers, who above all might be expected to make their intention clear in a document they compose, should have failed to express the existence of a trust if that was what they intended to create'.

In declining to find that a trust existed, their Lordships supported their reasoning by relying on the fact that the scheme in question was a statutory indemnity scheme. The rules have the force of statute and the master policy and certificate form part of those rules. The beneficiaries of the insurance scheme, ie solicitors and their associates, would (in the view of Lord Brightman) have a direct remedy against the insurers should they decline to perform the obligation imposed on them; and the insurers, likewise, were legally bound by the obligations expressed to be imposed on them by the scheme. The words 'on behalf of' might have been inserted to make it clear who had an insurable interest in the policy, pursuant to the Life Assurance Act 1774 as amended. But they did not, in the view of the House of Lords, import a trust.

Having disposed of a main argument it was then only necessary to consider whether there might be a *constructive* trusteeship of the commission received by the Law Society. This could only be so if the Law Society was guilty of unconscionable conduct in taking advantage of its statutory position so as to make a profit from premiums which it compelled solicitors to pay.

With regard to the argument based on a constructive trust, the House of Lords found that the Law Society had committed no impropriety. 'The premiums negotiated must be assumed to be fair premiums properly negotiated, in the absence of evidence to the contrary'. There was therefore no basis for the claim that the Law Society had been acting contrary to the requirements of justice and good conscience. Indeed it had obtained a sum of money as its share of brokerage (which would otherwise have enhanced the profits of the brokers themselves) and applied such money for the benefit of the profession as a whole.

Conclusion

Swain v The Law Society is of great interest to solicitors who jealously watch the exercise of the unique privileges conferred by statute on their professional body. Once the ultra vires challenge had failed in the Court of

Appeal, only a secondary issue remained. This secondary issue, namely whether a public body should account for commission received while exercising its statutory duties, reveals principles which are as much of interest to property lawyers as to solicitors. The conclusion reached by the House of Lords is a comforting one for the Law Society, whose honour was fully upheld. At the same time the careful analysis made by the House of Lords of 'windfall' profits in this rather unusual situation, and in particular the distinctions between a trust and a profitable performance of a statutory duty, are of general interest to property lawyers.

Negligence—Forster v Outred & Co (a firm) [1982] 2 All ER 753

The issue central to the interests of solicitors in this case concerned alleged negligence by the plaintiff's solicitors in that they failed to explain fully the effect of a mortgage deed which had been signed at the defendant's office. The case also involved points of civil procedure, particularly the question of whether the first of the two actions which the plaintiff brought should have been struck out for want of prosecution and whether the second writ issued was outside the appropriate six years' limitation period. It is not the purpose of this article to investigate these separate issues.

The allegation of negligence in connection with the explanation of the mortgage deed raises a matter of general interest since it emphasises the need to explain fully to the client the effect of the deed, particularly one which has an unusual effect.

In this case the plaintiff was an elderly lady with an improvident son. She owned a freehold property in Surrey and she signed a mortgage in respect of that property in favour of the Hume Corporation Ltd. The purpose of this mortgage was to enable her son to borrow money from the corporation to complete the purchase of a hotel. The mortgage was signed in the presence of the plaintiff's solicitor and the solicitor knew that the mortgage deed required it to be executed by the plaintiff in the presence of her solicitor, and his signature followed the words 'after the contents had been explained to her'. The mortgage was in fact taken out as continuing security for payment, on demand by the company, of all present or future, actual or contingent, liabilities owed by the son to the corporation. The son went bankrupt owing money to the company and the company then threatened to foreclose on the plaintiff's property unless she discharged her son's liabilities in full. These amounted to some £70,000 which she duly paid to the company.

The act of negligence complained of was that the plaintiff's solicitor should have fully explained the implications of signing the mortgage. In particular it should have been pointed out to the plaintiff in a fully comprehensible way that:

(a) the mortgage in question was the primary security for the son's debts to the corporation;
(b) the mortgage covered all present and future liabilities to the son so that there was a real danger that the plaintiff would be liable in respect of both present and future debts incurred by her son, and that there were no arrangements made to discharge the liability of her son to the corporation and relieve the plaintiff of liability under the mortgage;
(c) there was no safeguard to prevent the subsequent release of the charge

on the hotel so that the plaintiff's house remained the only security in respect of the plaintiff's son's indebtedness to the corporation. Amongst the remaining allegations were, that having failed to advise the plaintiff of her true position, the plaintiff rested on the belief that the mortgage was purely to provide a temporary security for a bridging loan to be superseded as soon as a permanent mortgage had been obtained by her son. Had she been advised fully, it was alleged, she would never have granted the mortgage over her house. However, by reason of her solicitor's negligence and/or breach of contract, she had become liable to and had paid to the corporation nearly £70,000.

It was further alleged that had the position been fully explained to her, the plaintiff would never have entered into the mortgage deed. She had only done so in the belief that the mortgage was to provide temporary security for a bridging loan pending a more permanent arrangement with her son. Had she been fully advised, she alleged, she would never have granted the mortgage over her house but having done so she subsequently became liable to pay the corporation nearly £70,000.

The Court of Appeal concluded that the plaintiff had suffered actual damage through the negligence of her solicitors by entering into the mortgage deed. The effect of this transaction had been to incumber her interest in her freehold estate with this legal charge and subject her to a liability which may, according to matters completely outside her control, mature into financial loss, which in the event did occur.

However, the crucial point was whether her second writ, which had been confined to claiming damages for negligent advice in regard to the mortgage, had been issued after the exploration of more than six years from the time the cause of action had accrued. The material dates were that she had signed the mortgage on 8 February 1973. She had only become liable to pay the corporation under the mortgage on 21 January 1975. On 27 March 1980 the material writ was issued. The Court of Appeal held that the plaintiff's cause of action against the defendant solicitors was complete on 8 February 1973, the date when the mortgage was signed, sealed and delivered, because the effect of her entering into the mortgage was to subject herself and her property to a contingent liability to discharge her son's liabilities with the corporation. This contingent liability might (and in fact did) mature into financial loss and in consequence diminished the value of her equity of redemption. It followed that the issue of the material writ was outside the six years limitation period.

As an important footnote, it was accepted by the Court of Appeal that an action against a solicitor for negligent advice lies in tort as well as contract and the decision to this effect of Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571 was found to be 'wholly convincing'. The case was analysed as being one of economic loss and as Dunn LJ stated:

> 'I would hold that in cases of financial or economic loss the damage crystallises and the cause of action is complete at the date when the plaintiff, in reliance on negligent advice, acts to his detriment.'

It is implicit from this principle, therefore, that it is not necessary for the plaintiff to quantify the actual amount of damages claimed. In this case such

amount would depend on events between the date of the mortgage and the date of the final claim of the corporation. It was regarded as being enough that having executed the mortgage the plaintiff had become the owner of the property subject to a mortgage. This gave rise to a 'quantifiable loss' and from that date her cause of action against her solicitor was complete. Leave to appeal was refused and the Appeal Committee of the House of Lords also dismissed the plaintiff's petition for leave to appeal.

A solicitor's authority—Waugh v H B Clifford & Sons Ltd [1982] 1 All ER 1095

The essence of the interest of this case as regards solicitors concerns the authority that a solicitor has to compromise litigation. More particularly here, the Court of Appeal was required to decide whether solicitors acting for builders had ostensible authority to bind their clients to the terms of a compromise of an action brought against them by two dissatisfied purchasers of their houses. The terms of the compromise were that the builders would re-purchase the allegedly defective houses at an agreed valuation.

The facts were extremely convoluted but it was common ground that the builders had expressly forbidden their solicitors to enter into the particular terms the compromise proposed which involved the appointment of an independent valuer to settle a price having regard to the houses' current value, disregarding the alleged defects. By inadvertence, though a prohibition from entering into such a compromise was communicated by telephone on 30 May, these instructions did not reach the partner dealing with the case until a week later. By this time the builders' solicitors had agreed with the buyers' solicitors on the appointment of an independent valuer by letter. The prohibition against the builders' solicitors acting in this way was unknown to the buyers and their solicitors. Although the terms of the compromise had been contained in an exchange of letters in informal terms, Brightman LJ held that the case fell to be decided in exactly the same way as if properly drafted terms of compromise had been drawn up and signed by the respective solicitors on behalf of their clients.

What, in the event, transpired was that the builders informed their solicitors that they no longer wished to settle the action and withdrew instructions from them. Furthermore they refused to proceed with the purchase of the allegedly defective houses. The buyers therefore sued the builders for specific performance of a contract to purchase the houses contained in an exchange of letters, or alternatively for damages, and as against the builders' solicitors, damages for breach of warranty of authority. The central point here, therefore, is whether there was a breach of warranty of authority by the builders' solicitors in these circumstances. In reviewing the cases Brightman LJ laid down the following helpful principles:

1. a solicitor of counsel retained in an action has an *implied* authority as between himself and his clients to compromise the suit without reference to the client, provided that the compromise does not involve matters 'collateral to the action';
2. the lawyer also has *ostensible* authority, as between himself and the opposing litigant, to compromise a suit without actual proof of authority, subject to the same limitation;

3. a compromise does not involve 'collateral matter' merely because it contains terms which the court could not have ordered by way of judgment in the action.

It follows from this that a solicitor (or counsel) could in a particular case have *ostensible* authority vis-à-vis the opposing litigant where he has no *implied* authority vis-à-vis his client. The Court of Appeal saw no logical objection to that. The only question for the opposing litigant is whether the compromise contains matter 'collateral to the suit'. The magnitude of the compromise as such is irrelevant.

The Court of Appeal concluded that it would be regrettable if too restrictive a limitation on the *ostensible* authority of solicitors and counsel to bind their clients to a compromise were imposed. The court should be reluctant to decide that matter is 'collateral' to the action unless it really involves extraneous subject matter. The commonsense view is that as a large number of compromises are made in court, or in counsel's chambers, with the solicitor but not the client being present, it is highly undesirable that the court should place any necessary impediments in the way of such a convenient procedure. In the instant case there was no dispute as to the lack of *implied* authority relating to the builders' solicitors' actions. They had no implied authority because they had been expressly instructed not to compromise on the proposed terms and, in any event, it was doubted whether they would have had *implied* authority ever to agree to a compromise involving liability of some £58,000 without asking first.

The question remained, therefore, whether the solicitors had *ostensible* authority vis-à-vis the other litigants to compromise the action. Since the buyers' solicitors had no notice of any limitation on the ostensible authority of the builders' solicitors to compromise the action, they were held entitled to assume that the builders' solicitors had had ostensible authority to compromise and were accordingly bound by that compromise.

This result is consistent with commonsense and the smooth running of a complex legal system. Although the chain of events whereby instructions were not obtained by the solicitors whose authority was in question in good time was unfortunate, nevertheless to allow disaffected litigants subsequently to question the authority of their lawyers in compromising civil litigation in the ordinary way would be a simple recipe for chaos.

Ceasing to act for parties to litigation—civil procedure

A comparatively simple point arose for decision in *Re Creehouse Ltd* [1982] 2 All ER 422 and [1982] 3 All ER 659, though the context of the litigation in which it arose was rather more complex. The decision concerned the principle stated in *Cordery on Solicitors* (7th edn, 1981) p 84 that 'if the client fails to take the solicitor's name off the record after the solicitor's retainer has been terminated, the solicitor may apply to the court for an order declaring that he has ceased to be the solicitor acting for the client'. This statement is made in the context of litigation and, more particularly, in the light of RSC Ord 67, r 6(2). It was on the precise significance of this rule that this decision depended. Rule 6, so far as material, stated:

> '(1) For a solicitor who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change . . . the solicitor may apply

> to the court for an order declaring that the solicitor has ceased to be the solicitor acting for the party in the cause or matter, and the court . . . may make an order accordingly. . . .
>
> (2) An application from an order under this rule must be made by summons . . . and the summons . . . must, unless the court . . . otherwise direct, be served on the party for whom the solicitor acted. The application must be supported by an affidavit stating the grounds of the application . . .'.

The purpose of the rule is obvious. If the client terminates the solicitor's retainer but does not take steps to remove the solicitor's name from the record, the solicitor must clearly have the right to do so himself by application to the court. However, the question arose in *Re Creehouse Ltd* on whom the summons, by which the process is started, should be served. Rule 6(2) clearly contemplates that the summons should be served, on the party for whom the solicitor acted. On the other hand, RSC Ord 32, r 3 lays down the general rule that 'unless the Court otherwise orders for any of these rules otherwise provides, the summons must be served on *every other party* not less than two clear days before the day so specified'.

The subject matter of the litigation was a petition presented by a Swiss company (the Swiss Rochem) seeking the compulsory winding up of a UK company, Creehouse Ltd. The petition was opposed by three other foreign-based companies on various grounds.

Litigation had already been taken to the Court of Appeal in connection with the procedure to be followed at the winding-up petition. Following this litigation the solicitors acting for Swiss Rochem (Messrs Payne, Hicks, Beach & Co) received a telex from their Swiss clients terminating 'your mandate in the matter of Creehouse Ltd with immediate effect'. With the consent of Swiss Rochem, Messrs Payne, Hicks, Beach & Co applied for orders declaring that they had ceased to be the solicitors acting for Swiss Rochem and, with the consent of Swiss Rochem, asked for payment of costs for the application and that service on Swiss Rochem be dispensed with. The registrar accordingly made an order dispensing with service of the summons and ordering that Messrs Payne, Hicks, Beach & Co 'cease to be the solicitors acting for' Swiss Rochem, with costs. That order was served on the foreign-based companies proposing the winding-up petition. A certificate of service was also filed in the Company's Court. Following these steps, Messrs Payne, Hicks, Beach & Co were taken off the record.

This transpired to be highly inconvenient to the foreign-based companies proposing the winding-up petition. They accordingly applied for an order setting aside the registrar's order declaring that the solicitors had ceased to be the solicitors acting for Swiss Rochem. Vinelott J at first instance stated that it was clear that the removal of Messrs Payne, Hicks, Beach & Co from the record made it far more difficult for these foreign-based companies to pursue the litigation. This was partly because

> 'it would be difficult, expensive and time-consuming to serve orders or notices of applications in Switzerland, and that while orders for substituted service can be made it would be expensive and time-consuming to obtain such an order every time such an order is made or notice of an application is given.'

The foreign-based company's argument was based, therefore, on Ord 32, r 3 (reproduced above). Their argument was, essentially, that since r 3 stipulates

that a summons by any party must be served on 'every other party', and the summons by Messrs Payne, Hicks, Beach & Co which led to their removal from the record was not served on them, the proceedings were irregular and the registrar's order removing them from the record should be set aside. The issue for the court was, therefore, whether Ord 67, r 6(2) (reproduced above) should be read subject to the general rule in Ord 32, r 3. It will be recalled that Ord 67, r 6(2) merely states that the summons in question 'be served on the party for whom the solicitor acted'.

Vinelott J concluded that this rule should not be read subject to any other rule, and that it was only necessary to serve a summons in this type of case on the solicitors' former clients (unless the court directs otherwise, as in this case). In this case it was clear that the solicitors' mandate had been withdrawn by their clients and, therefore, there was no reason why the court should not have exercised its discretion in removing them from the record. The fact that this made the litigation more difficult for the other companies involved was not a good ground for refusing to make the declaration. Indeed, to refuse to remove the solicitors from the record in these circumstances would have been to compel them to act 'as no more than a postbox' for their former clients in the same manner as if their instructions had never been terminated. The foreign-based companies' application that the registrar's order removing the solicitors from the record should be set aside was therefore dismissed.

On appeal, ([1982] 3 All ER 659) the Court of Appeal affirmed the decision of Vinelott J. The Court of Appeal confirmed that Ord 32, r 3 requiring a summons to be 'served on every other party' does not apply to an application by a solicitor under Ord 67, r 6. Rule 6(2) is not a summons inter partes in the litigation but a summons dealing with the relationship between the solicitor and his client and nothing more. Accordingly it need not be served on other parties to the litigation. Nor, the Court of Appeal held, was it material that by withdrawing the retainer of their solicitors, the Swiss company had deprived themselves of their ability to contest this litigation any further. This may, of course, have been what the Swiss company had intended.

Duties of solicitor and counsel for legally-aided client vis-à-vis the unassisted opponent—Kelly v London Transport Executive [1982] 2 All ER 842

This Court of Appeal case is in many ways the most important one affecting solicitors decided during the year. Many of the points arising in the Court of Appeal decision, which reflects Lord Denning's power to deliver lucid and creative judgments at its best, concern the interpretation of the Legal Aid Act 1974. But since few litigation solicitors will not have had severe doubts as to the fairness of the system where a legally aided plaintiff is suing an unassisted opponent (or sometimes the other way round) the guidelines laid down for the conduct of the proceedings by the Court of Appeal in this case are of great interest and importance.

The plaintiff, Kelly, was neatly described by Lord Denning, MR as 'a plausible Irishman and a chronic alcoholic'. His claim was for £100,000 damages for personal injuries against his former employers, London Transport. He had in fact slightly injured his head whilst at work—according to Lord Denning, 'a trivial injury'. Six months later he stopped work and lived

on Social Security benefits and, again according to Lord Denning, spent much of them on drink.

The plaintiff however attributed all sorts of ills, depression, eye trouble and bad hearing to the trivial injury suffered in 1974. An application for legal aid was made in 1977 on his behalf. Legal aid was first granted to obtaining counsels' further opinion, then for proceeding to the close of pleadings, then in 1980, the legal aid committee gave Kelly unlimited leave to go on with the action. By this time Kelly's solicitors had obtained 19 medical reports on the plaintiff's condition. On receiving the full legal aid certificate, a further five medical examinations were made of the plaintiff at which specialists engaged by the defendants were present. The defendants' specialists' view was that the accident had been caused by the plaintiff's chronic alcoholism, not by the accident. The defendants sent copies of their reports to the plaintiff's solicitors as soon as received, but the plaintiff's solicitors did not send copies of their reports to the defendants, other than one report which had been subsequently altered by the medical expert at the request of Kelly's solicitors to remove an unfavourable reference. Despite all the defendants' efforts, the plaintiff's medical reports were only produced a fortnight before the trial. Some £750 was paid into court in satisfaction of the plaintiff's case. This being unacceptable, a further offer was made to pay £4,000 in settlement of the plaintiff's damages and costs since, as the defendants pointed out, even if they were successful at the trial they would be unable to recover their costs from the legally aided plaintiff.

It is salutary to pause at this point. The situation revealed so far is not uncommon. No dispassionate critic should surely defend a situation whereby the unassisted party to litigation felt obliged to pay far more than any claim was worth purely because of the probable inability to cover costs if successful, from the legally aided opponent. How many times must this have happened in the history of the legal aid scheme? It clearly reveals a mischief which the Court of Appeal, in this case, were clearly troubled by and went on to make some suggestions with a view to its alleviation.

To continue the saga, the trial was held and during the course of it the judge remarked that 'there are more documents on the medical issue in this case than I have ever seen in the whole of my career at the Bar and on the Bench'. It was clear that, to quote Lord Denning again, 'armed with that legal aid certificate, the solicitors (for the plaintiff) pursued his claim most diligently. They spared no expense'. However, after a three day trial the trial judge found the plaintiff a wholly unacceptable witness and, on the admission by the defendants that Mr Kelly had suffered a slight cut to his head in 1974, £75 damages were awarded. This of course reverted to the legal aid fund so the plaintiff went away with nothing. The defendants, London Transport, regarded the claim as a bogus one which had been maintained and supported by the legal aid fund. On the other hand, counsel for the Law Society satisfied the Court of Appeal that the legal aid committee had acted properly. The court's attention was drawn to, eg, reg 68 of the Legal Aid (General Regulations) 1980, and reg 78 of those Regulations, both of which are designed to prevent abuses of legal aid. But, as Lord Denning pointed out, it is a difficult matter to try to get a legal aid certificate discharged. It means a new contest and virtually trying the whole case. Nevertheless there was no evidence here that the legal aid committee had not acted properly in

relying to a great extent on what they were told by the plaintiff's solicitor and his counsel. And it was on the solicitors and counsel advising the plaintiff that Lord Denning placed the blame.

The main issue before the Court of Appeal was whether s 13 of the Legal Aid Act 1974, as considered in *Nowotnik v Nowotnik* [1965] 3 All ER 167, could assist London Transport by entitling them to an order for the payment of the amount from the legal aid fund of costs of £8,000 incurred by them from the date of their payment of £750 into court in 1980 to the date of judgment. The main ground for their application was that they would 'suffer severe financial hardship' within s 13(3), of the 1974 Act.

In the event the Court of Appeal held that all the conditions laid down for the application of s 13 to the circumstances were fulfilled save one. This was the condition relating to 'severe financial hardship'. Counsel for the Law Society had submitted that companies cannot qualify under this condition. The have 'no body to be kicked nor soul to be damned'. They therefore can suffer no hardship. However, this argument was not accepted by the Court of Appeal. 'Suffering hardship' in that context is not limited to human suffering and there is no reason why a company cannot suffer severe financial hardship within the meaning of this condition. There are already two or three decisions of inferior courts to this effect.

Crucial, however, in the event was the difficulty that the Court of Appeal found in accepting that the London Transport Executive could suffer 'severe financial hardship'. As Lord Denning stated: 'they are in deficit, hopelessly and continuously, to the tune of nearly £175,000,000.' He went on to point out that they have to be supported by a grant from the Greater London Council since they are unable to fulfil their statutory duty to charge fares to the public so as to meet their expenditure. In the light of this huge deficit, the sum of £8,000 not unnaturally appeared to be a drop in the ocean. The sum of £8,000 for costs would make no appreciable difference to London Transport's dire affairs. Accordingly the Court of Appeal unanimously held that they were unable to recover costs against the legal aid fund.

However, a number of other important points emerged. Firstly, Lord Denning (obiter) pointed out that in his view the London Transport Executive could proceed against the solicitors and counsel for the plaintiff personally and require them to pay the costs:

> 'Over the weekend I have looked at the authorities in this matter. As a result, the principle is clear that a solicitor is under a duty, not only to his own client who is legally aided, but also to the unassisted party who is not legally aided. If the solicitor fails in that duty, the unassisted party is at liberty to call him before the court, where upon the court can make an order that he is to make good any loss or expense caused to the unassisted party by any breach of it. This is well established'.

Lord Denning expatiated on this aspect of the case by saying that solicitors acting for legally aided clients must enquire carefully into the claim made by their own legally aided clients as to see that it is well founded and justified. They must consider also the position of the other side. They must not take any advantage of the fact that their own client is legally aided and so not able to pay any costs. They must not use legal aid as a means to extort a settlement from the other side. They must not run up costs by instructing endless

medical experts for endless reports or by any unnecessary expenditure. In particular, they must not ask a medical expert to change his report, at their instance, so as to favour their own legally aided client or conceal things that may be against him. In Lord Denning's view, these remarks applied to counsel as well. Counsel would not be able to escape liability on the ground that the claim arose in the course of litigation. The principles in *Rondel v Worsley* [1967] 3 All ER 993 only avail them in regard to their own client. They have no immunity if they fail to have regard to their duty to the court and the other side.

As Lord Denning concluded, 'if these precepts are observed, I hope we shall in future have no more disgraces such as have attended this case.'

Disciplinary proceedings—R & T Thew Ltd v Reeves (No 2) [1982] 3 All ER 1086

This was one of Lord Denning's last cases and his judgment was a characteristic one, complete with subheadings. The first, and most significant, of these subheadings reads 'The "unacceptable face" of British justice.'

This Court of Appeal decision is a sequel to the same court's judgment in *R & T Thew Ltd v Reeves* [1981] 2 All ER 964. There the Thews had sued to obtain from a debtor sums which were undoubtedly due to them. They were baulked by the grant of legal aid to the defendant. Their own costs came to £7,000 but they were unable to recover these because a mistake had been made in the legal aid certificate.

At the hearing the Court of Appeal suggested a remedy. It appeared that the mistake might have been on the part of the articled clerk of the solicitors acting for the other side. He applied only for legal aid to 'defend', whereas he should have applied for legal aid to 'defend and counterclaim'. Since the Thews were unwilling to take action themselves on the court's suggestion, the court decided to act of its own motion. It ordered the solicitors for Mr Reeves to attend

> 'for the purposes of considering whether or not they should be ordered to pay personally costs . . . on the grounds that such costs were incurred and occasioned as a result of a mistake of their clerk or articled clerk such costs not being recoverable from the Law Society under the provisions of the Legal Aid Act 1974.'

This led the court to consider its jurisdiction over solicitors. This jurisdiction is both *punitive* and *compensatory*. Punitive jurisdiction is now rarely, if ever, exercised by the court. A judge may report a solicitor to the Law Society. The matter will then be considered by the Professional Purposes Committee. That committee can decide whether to charge him before the Solicitors Disciplinary Tribunal or not. The tribunal may in turn strike the solicitor off the roll or suspend him or fine him (see s 47 of the Solicitors Act 1974).

The Solicitors Disciplinary Tribunal has no power to award compensation to anyone. The court's jurisdiction with regard to compensation derives from s 50 of the Solicitors Act 1974 which preserves to the Supreme Court the same jurisdiction in respect of solicitors as the superior courts of law or equity had immediately before the passing of the Supreme Court of Judica-

ture Act 1973. This historical throwback led the court to explore in some detail the nature of the present jurisdiction, though much light is thrown on the matter by the House of Lords decision in *Myers v Elman* [1939] 4 All ER 484. As to this compensatory jurisdiction Lord Denning stated

> '. . . Our old books all show that if the solicitor for one side has done something wrong, which has caused useless costs to the other party, he could be ordered personally to compensate the other party . . . This jurisdiction still exists in full force. As a rule the party who has incurred the useless costs will himself make the application. This is not invariable. Sometimes the court may act of its own motion. As we did in this very case.'

In the event further evidence was produced which showed that the articled clerk in question should be acquitted of any negligence. The documents read as a whole could only be construed as an application for legal aid in respect of the counterclaim, since there was no *defence* to the action at all. There was, therefore, no 'serious misconduct' by the solicitors whose actions were put under the microscope in this case. O'Connor LJ added that he did not wish to express any opinion which might affect any issue between the solicitors and there own client should there be one. However, it is clear that the court's own compensatory jurisdiction, which has disciplinary connotations, was inappropriate in these circumstances.

Costs

It is appropriate to end with two cases on costs, both essentially concerning the meaning of a 'contentious business agreement'.

In *Chamberlain v Boodle & King (a firm)* [1982] 3 All ER 188 an American gentleman instructed the firm of Messrs Boodle & King in regard to a complex piece of legislation part of which was proceeding abroad. Work commenced in December 1978 and in January 1979 the solicitors wrote to their client that they would bill him for the firm's services rendered on the basis of the standard hourly rate applicable to the particular attorneys or solicitors involved in the litigation. These rates would range from £60 to £80 per hour for lawyers of partner status and from £30 to £45 per hour for associates who may be involved. These rates were subject to review every year and the firm stated that bills would be rendered on a regular basis, either monthly or quarterly. They also asked for a cheque for £2,000 representing a retainer. This would be treated as an advance payment. In reply their client sent a cheque for £1,000 and promised to remit the balance within two weeks.

Subsequently bills were sent to Mr Chamberlain on three occasions and finally, after the litigation was settled, the total bill came to £30,099.49, rendered by a series of four bills.

The issue was a short one. Mr Chamberlain claimed that these bills should be taxed. The firm contended that the client had no right to have them taxed because there had been a 'contentious business agreement'. Section 59 of the Solicitors Act 1974 states that

> 'a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him . . . providing that he shall be remunerated by a gross sum or by a salary, or otherwise, and whether at a higher or lower rate than at which he would otherwise had been entitled to be remunerated.'

Section 60 of the same act goes on to state that 'the costs of a solicitor in any case where a contentious business agreement has been made shall not be subject to taxation'. The firm also argued in the alternative that the four bills were separate bills for the purposes of s 70 of the Act and since the plaintiff had not demanded taxation of each of the first three bills within a month of their receipt, no order could be made for their taxation pursuant to s 70 of the 1974 Act. Section 70 provides that

> 'where before the expiration of one month from delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into Court, order that the bill be taxed and that no action be commenced on the bill until the taxation is completed.'

The Court of Appeal held that the letters mentioned above did not constitute a 'contentious business agreement'. An agreement by letter could only amount to such if it was specific in its terms and signed by the client. Here the defendant firm's letter was imprecise as to the amount for which the plaintiff might expect to be liable and was silent as to the disbursements. Nor did the plaintiff in his reply express assent to the rates of charging which the defendants proposed. Furthermore, since there were no natural breaks in the work, the four bills were to be regarded as a single bill divided into parts. Accordingly the plaintiff was entitled to have the whole bill taxed.

The meaning of a 'contentious business agreement' was again in issue in *Martin Boston & Co (a firm) v Levy and another* [1982] 3 All ER 193. Here the plaintiffs' solicitors had acted for the defendants in litigation and the defendants had had difficulty in paying the legal fees and disbursements incurred on their behalf by the plaintiff firm. As a result of negotiations between the parties the defendants agreed by letter to pay the sum of £45,000 plus disbursements by three monthly instalments involving post-dated cheques. One such cheque for £32,648 was dishonoured on presentation. The plaintiffs then brought an action on the cheque without having delivered the bill of costs. The defendants' new solicitors discovered that judgment in default had been obtained (by a series of events which are not directly relevant here) and applied to have the judgment set aside. The basis of their argument was that a solicitor was only entitled to recover the costs in respect of contentious business in two circumstances. One was where he had made a valid contentious business agreement with the client in accordance with s 59(1) of the 1974 Act already discussed. Alternatively he must deliver a bill of costs in accordance with s 69(1) of the Act. Section 69 prohibits any action being brought to recover any costs due to a solicitor before the expiration of one month on the date on which a bill of those costs is delivered (except in stated circumstances). The defendants' new solicitors argued that these provisions could not be circumvented by bringing an action on the cheque.

Warner J held in the Chancery Division that this argument was correct. The provisions of ss 59 and 69 of the 1974 Act could not be evaded simply by taking a cheque and suing thereon. The judgment on the cheque was accordingly set aside. Support for this conclusion was found in *Ray v Newton* [1913] 1 KB 249, a decision of the Court of Appeal, on a more antiquated version of the present legislation. The learned judge came to no definite conclusion as to whether the defendant had a good defence to the action on the cheque. This depended on complex questions of consideration which were fully con-

sidered in his learned judgment. The issue here was only whether the judgment should be set aside, and, in deciding to do so the judge declined to impose any onerous financial terms on the defendant.

Conclusions

One of the earlier cases to be reported in 1983 also concerns costs—namely, the desirability under s 69(2) of the Solicitors Act 1974 of a solicitors' firm signing their bills with the firm's name in full. It may be that this taken with the other cases on costs considered above is an indication of the readiness with which clients are now prepared to challenge the bills rendered by their professional advisers. But more of this next year.

Succession

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The law of wills

One of the few cases reported in 1982 on the law of wills concerned the jurisdiction to make a will for a mentally disordered patient. This jurisdiction was conferred on the court by the Administration of Justice Act 1969 which added a new paragraph (dd) to s 103(1) of the Mental Health Act 1959. The power is to be used sparingly but can in appropriate cases be used to prevent an undesirable intestacy when the patient does not himself have testamentary power. A graphic illustration of the usefulness of the jurisdiction was recently provided by *Re Davey (decd)* [1980] 3 All ER 342 where a former will which had been revoked by a voidable marriage (see *Re Roberts* [1978] 3 All ER 225) was, in effect, restored by the court making a new will for the patient in identical terms. The jurisdiction has been further considered by the Vice-Chancellor in *Re D (J)* [1982] 2 All ER 37 where practice and procedural guidelines are laid down. Sir Robert Megarry V-C also reviewed the principles or factors which should guide the judge in the execution of the will, and these have been stated under five heads. First, it should be assumed that the patient is having a lucid interval at the time when the will is made. Secondly, that, during the lucid interval, it should be assumed that the patient has a full knowledge of the past and a full realisation that as soon as the will is executed he or she will relapse into the actual mental state that previously existed (applying Cross J in *Re L (WJG)* [1965] 3 All ER 865). Thirdly, it is the actual patient who has to be considered and not a hypothetical patient, ie that the approach should be subjective not objective. The comment by Fox J in *Re Davey (decd)* (above) to the effect that the essential question was 'what if anything would be reasonable provision in all the circumstances for the various contestants' was not followed in so far as it suggested an objective approach. Fourthly, during the hypothetical lucid interval the patient is to be envisaged as being advised by competent solicitors. Fifthly, in all normal cases the patient is to be envisaged as taking a broad brush to the claims on his bounty, rather than a minute and detailed examination of each and every claim on his benefaction.

These guidelines are a welcome elucidation and clarification of the law and will assist not only the court in making a will, but legal advisers in circumstances when the possibility of invoking the jurisdiction is to be considered. The Vice-Chancellor also stressed the necessity for the application to set out 'the hard facts of the case', namely, reasonably detailed information as to the size of the estate, the income, and the expenses of maintaining the patient. In the majority of cases where there is general agreement as to the terms of the will, the applications will be heard by the master or deputy master (see *Practice Direction* [1970] 1 All ER 208). Where the terms of the will are not agreed then the matter should normally be heard by a nominated judge unless by reason of the amount involved or the general circumstances of the case, unreasonable expense or delay would be caused.

The subject of construction of wills usually provides a number of reported cases each year and the most interesting such case in 1982 concerned the will of the writer George Orwell. In *Re Orwell's Will Trusts* [1982] 3 All ER 177, the court was concerned with the construction of a charging clause and thus the question whether a person appointed as literary executor was entitled to charge remuneration for dealing with literary estate. The harshness of the usual rule that an executor or trustee is in general entitled to no allowance for his care and trouble is normally, if not invariably, mitigated by an express charging clause. Such a clause was included in the will in question but would seem on a strict construction (which is usually regarded as the norm with such clauses) to only authorise a trustee and not an executor to charge for his services. The court, however, was able to decide as a matter of construction that the clause did entitle the person appointed to charge for services performed in connection with the literary estate whether as executor or trustee. Further, the general rule which precludes a trustee from charging for his services extends to any firm of which he is a partner; thus a well drawn charging clause will permit a trustee to charge and be paid reasonable and proper charges for business transacted by him or his firm. The clause in question in George Orwell's will referred to 'a firm' and although this word in its narrowest sense is apt to describe an unincorporated partnership, Vinelott J thought that it could equally apply to a private company thus enabling the private company of which the literary executor was a director, to charge for work done. It was also decided that the rule that a trustee had to account for remuneration received from a company in respect of the administration of trust property (see *Re Gee (decd)* [1948] Ch 284) has no application where the only nexus between the benefit or remuneration received by the trustee from the company and the trust estate, would be that the income of the company included remuneration and commission from the trust which the company would be entitled to charge and be paid.

Probate

The case of *Re Flynn (decd)* [1982] 1 All ER 882 raised a number of interesting points regarding probate actions. An action was brought, nearly six years after the grant of probate, against the executors asking the court to pronounce against a codicil and a will, and if necessary to revoke the grant of probate. The residuary beneficiary under the will asked the court to dismiss the action under RSC Ord 18, r 19(1) on two grounds; first, on the ground of the plaintiff's delay in instituting the action, and secondly, that the statement of claim disclosed no reasonable cause of action. In considering the first point Slade J reviewed the authorities, notably the Court of Appeal's decision in *Re Coghlan (decd)* [1948] 2 All ER 68 and concluded that the cases supported the view that the court will never strike out an action to revoke a grant of probate or letters of administration on the mere ground of delay in instituting it, unless it is satisfied that the claim is otherwise frivolous or vexatious or is for other reasons an abuse of the process of the court. Further even if the power did exist the judge refused to exercise its discretion on the facts of the case before it mainly because the assets of the estate had not been distributed and the delay in instituting the proceedings was not inexcusable since it had originally appeared that the estate was insolvent. Not did it appear that there

had been any serious prejudice to the residuary beneficiary or to the chance of a fair trial.

The second ground for the action in the case centred on the plaintiff's allegation that the codicil had not been properly executed on the grounds that the deceased did not know and approve the contents and that the execution of the codicil had been obtained by the defendant's undue influence. The defendant asked for these contentions to be struck out on the basis that as pleaded, the plaintiff had disclosed no reasonable cause of action. This application was dismissed because the court thought that there was at least sufficient substance in the arguments under both heads to cause the court to refrain from exercising the striking out jurisdiction which should only be exercised in a clear case. The court briefly reviewed, and reiterated, the accepted principles relating to the proof of knowledge and approval, and to the proof of undue influence, in relation to wills.

Executors and administrators

It is, of course, axiomatic that acting with due prudence, executors should take proper steps to protect their testator's estate against adverse claims. However, where the claim is against not part of the estate but the whole then a difficulty arises, since if the claim succeeds they will not hold any estate out of which they can indemnify themselves for the costs of defending the estate. This difficulty was considered by the Vice-Chancellor in *Re Dallaway (decd)* [1982] 3 All ER 118 who, in the absence of direct authority governing the point with reference to executors, looked for a solution in the analogous cases regarding trustees. Applying the principle of *Merry v Pownall* [1898] 1 Ch 306, at p 312 that trustees, and analogously personal representatives, who have acted properly ought to be allowed their costs, it was held that a personal representative who was a party to proceedings in that capacity was entitled under RSC Ord 62, r 6(2) to be reimbursed his costs out of the fund held by him, even though the claimant in the proceedings was a beneficiary under a will who was claiming the entire estate.

The Court of Appeal in *IRC v Stype Investments (Jersey) Ltd* [1982] 3 All ER 419 was concerned with two points arising out of transactions conducted by the late Sir Charles Clore, in an attempt to transfer substantial assets to Jersey in order to avoid English taxes. The complex facts cannot be adequately summarised here but suffice it to say that the case provides a salutary warning of the dangers of inter-meddling with a deceased's estate, which can lead to being constituted executor de son tort and thus potentially liable for capital transfer tax. The court also thought the circumstances of the case were sufficiently special to justify passing over the executors appointed and to make a grant ad colligenda bona. Templeman LJ, commenting that the appointment of the executors as personal representatives would be 'bizarre', castigated the appeal as 'a sinister and time-wasting exercise'.

Taxation

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The year 1982 was dominated by a massive Finance Act but the year has nonetheless seen significant developments in the case law. For this article cases reported in the 1982 volume of Simon's Tax Cases as well as those in the All England reports are considered.

Schedule E

The problem of the relationship between the rules of the Finance Act 1976 applying to directors and higher paid employees and the rest of the tax code was considered by the Court of Appeal in *Wicks v Firth* [1982] 2 All ER 9, a decision since reversed by the House of Lords. The point was a short one. ICI had established and financed an educational trust; the trust gave the trustees a discretion to award grants for full-time instruction at a university or comparable establishment. The possible beneficiaries were limited to the class of children of employees of ICI and of other related companies. The trustees made a grant to the child of a higher-paid employee. The question was twofold:

1. Did the payment fall within the Finance Act 1976 s 61 as a benefit conferred on a member of the employee's family and so to be treated as a taxable benefit of his employment; and
2. if it did, was it taken out of charge by TA 1970 s 375 which provides that income received under a scholarship, exhibition or bursary shall be exempt?

On the first question, the Court of Appeal were unanimous—and were later to be upheld unanimously by the House of Lords—in holding that the payment was provided by the employer and so was deemed to be made 'by reason of the employment' by the deeming provisions in FA 1976 s 72(3). The effect of this was that a charge arose under s 61. Had this not been so it would have been necessary to decide whether as a matter of fact the payment was made by reason of the employment. The Court of Appeal would have so held.

Disagreement came on the second question. Here the Court of Appeal by a majority—to be reversed by the House of Lords—held that the excluding provisions in other parts of the tax legislation, eg TA 1970 s 375, could not be said to override the clear liability arising under s 61. As the point caused such division among the judges—and at least one member of the House of Lords was to say that he could not understand any other decision than the one he was to reach (which was not the one reached by the Court of Appeal)—the point needs analysis. The majority view in the Court of Appeal was that while s 375 did indeed have the effect of removing any possibility of a charge to tax on the benefit in the hands of the child, this was quite irrelevant to the question whether the same payment should be treated as income of someone

else, the employee, by virtue of FA 1976 s 61. It is suggested that the majority in the Court of Appeal were correct—and for the right reason. (One notices incidentally a careful consideration of the statutory origins of s 375 in the Court of Appeal—and none in the House of Lords; one must however concede that anomalies will arise whichever view is taken).

In support of the Court of Appeal one may say that, as a general view, the taxable status of the payment in the hands of the beneficiary is completely irrelevant to the question of liability under s 61. Section 61 catches benefits provided for the employee or members of his family or household. If an employee simply gives a child £2,000 there is a gift of capital; no question of income tax in the hands of the child can arise and yet there is no doubt that s 61 can apply—and rightly so. From this it is but the proverbial short step to *Wicks v Firth* itself.

Lord Denning dissented in the Court of Appeal but was to be upheld in the House of Lords—a fact surely worth a note of its own. For the Master of the Rolls life was delightfully simple. Although the 1976 legislation contained a number of exceptions to its provisions, scholarship income was not there to be found—simply because there was no need to do so—such income was already clearly exempt by the wide words of s 375. Parliament clearly intended that there should be no income tax on scholarship income. This —perhaps characteristic—line of reasoning is surely too brisk. There is no logical compulsion to the conclusion at all and repetition is no substitute for reason. The notion that lies behind Lord Denning's view is that Parliament has decided that certain types of payment are to be exempt from income tax and therefore outside s 61. Such a view is surely too simple. The logic of the reasoning applies not only to payments which Parliament has expressly excluded from income tax—as in the instant case—but also to those payments which Parliament has not expressly excluded from income tax because no one in his right mind would ever dream that they would fall within the concept of income (consider the gift of capital above) and also to other provisions excluding income tax. Thus if the child is neither resident nor ordinarily resident in the United Kingdom would a gift of gilt-edged stock from the company to the child be excluded from s 61 because (a) the gift itself is one of capital (see above) and (b) the income arising from the gilts is expressly excluded from the tax base by TA 1970 s 99? Or should one consider the taxable status of the employee?

The alternative—and, to the writer, the preferable—view—viz that the payments fall within s 61—raises a different question. While s 375 will not affect the liability of the employee if the payment is made to the employee's child, would it exempt the income in the hands of the employee with a grant to be made to the employee himself? In view of the decision of the House of Lords this point will not now arise. However two other issues are left open by the case. The first is whether, when considering s 72(3) and whether a benefit is 'provided by' the employer, the test is one of *causa sine qua non* or *causa causans*. The general test of liability under Schedule E requires a test of *causa causans*—see eg *Hochstrasser v Mayes* ([1960] AC 376, [1959] 3 All ER 817). There are statements in the Court of Appeal that the *causa sine qua non* test is sufficient for s 72(3), although these were not expressly approved in the House of Lords. The second issue is one not raised in the case as a result of the revenue concession; the question of what is a scholarship.

Donnelly v Williamson [1982] STC 88 raises a short but interesting point. An education authority made a payment of a car allowance to a teacher to cover her costs in travelling to out-of-school functions in her own car. The question was whether she was subject to tax on these payments. Walton J, basing himself on *Owen v Pook* [1967] 2 All ER 579, held that the reimbursement of an expense was not an emolument and therefore was not taxable. This point seems clear on the authorities and completely unobjectionable. Perhaps unnecessarily Walton J also based his decision on another ground—indeed this was his primary ground. The primary ground was that when she was attending out-of-school activities, the teacher was doing something not required by the terms of her employment and therefore a payment for such services could not be an emolument. This principle will have to be applied cautiously. No one would suggest that a payment for overtime should not be a taxable emolument simply because the employee is not obliged to work overtime. Reviewing the cases, it is clear that payments for services are taxable and that payments for things which are clearly not services are not taxable. The precise question whether a payment is for service or for something else is of course a question of some subtlety as the cases on testimonials and gifts for personal services show. Judged in this context the decision in *Donnelly v Williamson* may be taken as an example of one of those cases fairly close to the line which a court has to decide. One should note that in this case the finding by the Commissioners was upheld by the court.

Another decision of Walton J is of interest in this area. In *Bird v Martland* [1982] STC 603 the court held that where a sum was paid to an employee by way of compensation on the withdrawal of a perk, the payment being made to preserve the employer's good name and good staff relations, the payment made was a taxable emolument. In *Cheatle v IRC* [1982] STC 376 Nourse J had to consider whether a share scheme fell within FA 1972 s 79 and held first that the opportunity offered to the taxpayer by means of an interest free loan was within that section and secondly that the taxpayer's acquisition of the shares was not 'in pursuance of an offer to the public'.

Capital allowances

This area is dominated by the two decisions of the House of Lords on the meaning of machinery and plant—*IRC v Scottish & Newcastle Breweries* [1982] 2 All ER 230 and *Cole Bros Ltd v Phillips* [1982] 2 All ER 247. In the first case the House of Lords upheld the Commissioners' finding that expenditure on decor, murals, plaques, tapestries, pictures and metal sculptures for the purpose of creating an atmosphere attractive to customers in a hotel was expenditure on plant. In rejecting the Crown's appeal Lord Wilberforce stressed that the question, What is plant? has to be answered by considering carefully the nature of the particular trade carried on and the relation of that expenditure to the promotion of that trade. In extreme cases the court could ask whether it could really be supposed that Parliament desired to encourage particular expenditure out of, in effect, taxpayers' money. The leading speech was however given by Lord Lowry and is a major contribution to jurisprudence in this area.

The decision in *Cole Bros Ltd v Phillips*, a decision reached very shortly afterwards by a very differently constituted committee of the House, merits a

rather different reaction. The question concerned the cost of installing an electrical system at a department store at a shopping centre. In the House of Lords the matter turned itself simply into a question whether the Commissioners had made an error of law in holding that the installation was not a single entity but a collection of separate installations. This was, the House held, a matter of fact and degree and so peculiarly for the Commissioners. Frustratingly for the taxpayer, the members of the House of Lords generally indicated that they would not have reached the same decision as the Commissioners but, of course, this was not enough to enable them to reverse the Commissioners' decision. This rather broad approach is an encouragement to the taxpayers to litigate every such issue and to do so year by year. In view of the sums involved one must wonder whether the present appeal structure with its limits on the powers of the appellate courts is due for reform.

Two minor cases were reported. In *Leeds Permanent Building Society v Procter* [1982] 3 All ER 925 expenditure on various screens for a building society were held to be items of plant. In *Vibroplant Ltd v Holland* [1982] 1 All ER 792 the court adopted a strict view in interpreting the definition of industrial building in CAA 1968 s 7.

Interest and discounts

In *Cairns v MacDiarmid* [1982] STC 226 Nourse J was faced with a scheme under which a claim was made for a deduction of interest against income under FA 1972 s 75. In order to qualify for the deduction the payment had to be one of annual interest. Under the scheme the taxpayer received a loan of £X for two years; interest was charged at yearly intervals and was to be paid in advance. The first payment of interest (£5,000) was made two days after the loan. Four days later there was a novation of the loan and the taxpayer was released from his obligation under the loan in return for a payment of £(X − £5,000). The purpose of the scheme was to enable the taxpayer to claim the £5,000 paid by way of interest as a deduction; that sum exactly equalled a sum already paid by way of bonus to the taxpayer shortly before so that the object was to make the bonus tax free by the use of an offsetting deduction. Nourse J held that it was essential to the concept of interest that it should be a payment for the use of money by time. In addition, the interest has to be a just payment for that use. He went on to rule that payment for the use of the money for less than a week could not be said to be a just payment and therefore the payment was not one of interest. As a second ground Nourse J would have held that the payment was not annual interest and therefore did not qualify for relief. This decision was to be upheld by the Court of Appeal ([1983] STC 178) but on the ground that the payment was not annual interest. Sir John Donaldson MR would not have held that the payment was one of interest but for a reason other than that given by Nourse J. For Sir John there was nothing unjust about the payment of interest since the obligation was discharged within the week not by repayment but by novation. For Sir John the decision of the House of Lords in *W T Ramsay Ltd v IRC* [1981] 1 All ER 865 enabled him to hold that the payment did not qualify for the deduction rule, thus leaving open the possibility of still charging the recipient to tax on the interest received.

Schedule D case III taxes not only interest but also 'all discounts'. Cases on

discounts are rare but one such came before Walton J in *Ditchfield v Sharpe* [1982] STC 124. An English company had issued a promissory note promising to pay virtually £2.4 million free of interest on 1 February 1973; the promissory note was dated 23 May 1969. The note was issued by the English company to grantees who sold it to a merchant bank who sold it to the taxpayers who were trustees of a settlement. The merchant bank guaranteed that at maturity the trustees would receive at least 75% of its face value. The note was redeemed in full on the due date and the trustees realised a profit of some £460,000. They were assessed for income tax and Schedule D case III on the ground that the profit realised on redemption of the promissory note was a discount within the meaning of TA 1970 s 109(2). That assessment was upheld with the result that the entire profit accruing to the trustees on the maturity of the note was a taxable receipt in the year of redemption.

The case is worthy of note for two reasons. The first was a close analysis by Walton J of what amounted to a discount. For example, there is the problem of distinguishing a discount from a premium. Case law establishes that a premium on a loan may be treated by the tax system as one of interest (eg *Lomax v Peter Dixon & Son Ltd* [1943] 2 All ER 255). As Walton J said

> 'it appears to me that there must be an exceptionally fine line between contracting a debt £X at an immediate discount of £Y and contracting a debt of £X − £Y at a future premium of £Y, when the total sum of £X is in both cases the same and is payable at the end of the period of delay. It appears to me that the true analysis of the arrangement between the parties must depend on a close analysis of the arrangements they in fact made. However, in the present case I take it that it is agreed that the choice is settled for a discount, assuming that the court has to choose between these two possible analyses.'

The point had not been argued by counsel.

The second reason is that, as Walton J says, it is, quite clearly, not every discount, even when a discount is present, which renders the whole transaction one 'of a discounting nature' and it is necessary for the transaction to be of such a nature if liability under Schedule D case III is to arise. This point was not explored further since the facts clearly showed that the profit thrown up on redemption was a payment of an income nature. The whole area thus remains one of considerable subtlety; whether this is a good thing is something else.

Tax avoidance schemes

The new approach to tax avoidance schemes announced by the House of Lords in *Ramsay v IRC* (1981) has been applied with more enthusiasm at the appellate levels than at first instance. This is however nothing compared with the enthusiasm with which the Revenue have been invoking *Ramsay*. Apart from the Revenue's enthusiasm and the uncertainties inherent in a case law principle, there are two further reasons why tax practitioners have found the *Ramsay* principal hard to adjust to. The first is that, being judge-made law, it cannot operate only as from a certain date and the second is that the judges have no power to prescribe that there should be a clearance procedure.

The principle laid down by the House of Lords in *Ramsay v IRC* is that where there is a scheme which is a pre-conceived and ready-made plan which, once started, should proceed to completion and should not be

arrested halfway, uses borrowed money and which is conceived for the whole and only purpose of the avoidance of tax, the court is entitled to disregard different steps in the scheme and to apply the tax legislation by comparing the taxpayer's position before the first step in the scheme with that after the last one. So in the *Ramsay* case and its satellite *Eilbeck v Rawling* [1981] 1 All ER 865, a circular transaction was disregarded; the taxpayer was not allowed to put money into a process by which it was split into two sums representing on the one hand non-taxable gain and on the other hand allowable loss and claim the allowable loss for capital gains purposes.

In *IRC v Burmah Oil Co Ltd* [1982] STC 30 there were two minor differences. The first was that the company used its own money and the second was that the plan was especially devised for the taxpayer company rather than being available off the shelf to anyone who would pay for it. These points of distinction were treated by the House of Lords as being of no importance. In essence the taxpayer company found itself with a substantial debt due to it from a subsidiary and tried to convert that worthless debt—which was not allowable for capital gains purposes—into worthless equity—on which the loss would have been allowable for tax purposes. The attempt failed.

The story begins with the taxpayer company holding a substantial holding of shares in another company (BP). In March 1969 the taxpayer transferred those shares to another company (Holdings) which it controlled; the transfer was for full market value but the purchase price was left outstanding. The purpose of the transfer was to enable the taxpayer (by using Holdings as a regulatory company controlling the dividends received from BP) to limit its receipt of dividend and thus its dividend payments so as to obtain maximum overspill relief under FA 1965 s 84—a provision of no further importance. Two years later when, presumably, this control was no longer required, the shares were transferred back to the taxpayer—again at market value. Unfortunately this left Holdings with no assets and, owing to a drop in the value of the BP shares, a large debt due to the taxpayer without covering assets. As the debt due from the subsidiary to the parent was not a debt on the security, the debt was not a chargeable asset and therefore the capital loss resulting was a non allowable loss. Burmah therefore sought a way to convert the non allowable capital loss into an allowable capital loss.

At this point a certain scepticism crosses one's mind. The shares had been transferred twice between members of the same group and therefore, for capital gains purposes, for a value equal to the taxpayer's base cost at each time—by virtue of TA 1977 s 273. If the taxpayer now sold the shares it would have been entitled to relief of the entire loss sustained; why should the taxpayer get double loss relief? However it is equally true that if the original transfer had been structured differently an allowable loss could have been made to accrue. Thus if there had been a debt on security instead of a simple debt, or if the transfer had been in return for shares rather than a debt, an allowable loss would undoubtedly have accrued. What this point highlights is the present unsatisfactory treatment of capital gains where companies are involved.

The taxpayer company then entered into an elaborate scheme the effect and purpose of which was two-fold. The first was for the taxpayer to funnel

money through another company (M) to Holdings. With the loan from M, Holdings repaid the debt to the taxpayer. This left Holdings with a debt to M. To finance this the taxpayer subscribed to a rights issue in Holdings. With the money raised by the rights issue Holdings repaid the debt to M and then went into liquidation. This left the taxpayer nursing a large loss on its shares acquired under the rights issue. The question was whether the sums paid under the rights issue—around £159,000,000—could be deducted in computing the loss. In reliance on the *Ramsay* principle the Revenue argued successfully and simply that there was no real loss and certainly no loss in the sense contemplated by the tax legislation. As Lord Fraser put it,

> 'the result was that although Burmah had apparently suffered the loss of almost the whole price that it had paid for the new shares, except for the cash balance returned on liquidation, it suffered no real loss because it got back all the money except the capital duty on the new shares. Moreover it still had the BP shares which could have realised in the open market at a loss on the original price. If the argument for Burmah is right, this would be one more case in which the taxpayer had achieved the apparently magical result of creating a tax loss which was not a real loss.'

As already indicated the cases at first instance show a rather different approach. The most important of these is the decision of Vinelott J in *Furness v Dawson* [1982] STC 267. By way of preamble one should outline the earlier decision in *Floor v Davis* [1979] 2 All ER 677. In *Floor v Davis* the shareholders of a company (P) wished to sell their shares to a non resident company (F). As a simple sale would have resulted in indisputable liability to capital gains tax, they decided to carry out a scheme in two phases. Phase one began with the setting up of a new company (Q) with ordinary and preferred shares, the former carrying rights to one seventh of all dividends and sixth sevenths of the capital on a winding up and the latter with reverse rights. The taxpayers then sold their shares in P to Q in return for preferred shares, the preamble stating that this was with a view to a sale by Q to F. Phase one thus ended with F holding the shares in P and with the proceeds of the sale resting in Q, the new company. Phase two was concerned with the extraction of the proceeds of sale from Q and their transfer to the taxpayers. A Cayman Islands company acquired a small number of preferred shares. Q then made the offer of a rights issue to its shareholders which only the Cayman Islands company took up with the result that it became the only holder of ordinary shares in Q, Q was then wound up and the taxpayers received cash sums for their shares in Q.

The House of Lords was able to conclude that the scheme fell foul of what is now CGTA 1979 s25, as an example of value shifting. For present purposes the interest in the case lies in the approach of Eveleigh LJ in the Court of Appeal where he held that this should be treated as a disposal by the taxpayers to F. This approach was expressly approved by members of the House of Lords in *Ramsay*.

Furness v Dawson involved a scheme similar to that in *Floor v Davis* but with the important qualification that the whole process stopped at the end of phase one. In *Furness v Dawson* the taxpayers held shares in Opco which they wanted to sell to another company (WB). They therefore sold those shares to an Isle of Man company (G) in return for shares in G. G then sold the shares in

Opco to WB. One should add that the shareholders in Opco also controlled G but that the management of G was conducted in the Isle of Man so that it was resident in the Isle of Man. The Revenue argued that the scheme should be undone by treating the receipt of the money by G from WB as being a receipt by the taxpayers and invoked *Ramsay*. Vinelott J began by reasserting the doctrine in *IRC v Duke of Westminster* [1936] AC 1:

> 'In ascertaining the fiscal effect of a transaction the court must have regard to the substance of the transaction; that is to the position which results from the legal rights and obligations of the parties ascertained from ordinary legal principles. The court cannot disregard the transaction which the taxpayer has actually entered into and the rights and obligations which flow from it, and substitute some more straightforward transaction, on the ground that the more straightforward transaction would have achieved a similar economical business result and is the transaction the taxpayer would have entered into if he had not set out to achieve that economical business result in the way that reduced the incidence of tax.'

He went on to explain *Ramsay* and *Burmah*:

> 'In ascertaining the substance of a transaction the courts must look at the whole of the composite transaction if it appears that it was designed and intended to be carried through as a whole . . . whether a transaction can be treated as a single composite transaction or as one of a number of independent transactions and what, if any, change in the legal rights and liabilities of the parties results from the scheme as a whole are questions of law on which the decision of the Commissioners is reviewable by the courts.'

He then said that the *Burmah* case showed that the new approach was not confined to cases where the steps taken in furtherance of a single composite scheme are circular or self-cancelling and can be simply excised as a cancerous growth leaving the tissue to grow together again. It also showed that the court could disregard the transaction and treat it as fiscally a nullity even though there was a change in the legal position of the parties before and after the scheme was carried through. Thus in *Burmah* the debt from H had been repaid and replaced by money subscribed for the shares—the substitution of worthless equity for a worthless debt. However, in what may well turn out to be one of those phrases which enter the fabric of the law, he went on to say that this was only so where the change could be regarded as a 'mere change of form' with 'no enduring legal consequences'. In *Burmah* the change was one of form. In *Furness v Dawson*, on the other hand, the receipt of money by G was not the same in form as the receipt of money by the taxpayers. What then of *Floor v Davis*? Vinelott J analysed that decision and concluded that the approval of the approach of Eveleigh LJ in *Ramsay* presupposed that a gain had accrued to the taxpayers—ie that the transaction consisted of both phase one and phase two—and therefore the issue was whether this resulted from an indirect disposal to F. This presupposition did not exist in *Furness v Dawson* and so *Floor v Davis* could be distinguished.

The decision of Vinelott J shows, as many had thought, that there are limits to the *Ramsay* principal and that a line must indeed be drawn somewhere if the *Westminster* doctrine is to survive; that the *Westminster* doctrine should survive in some form seems to be generally regarded as desirable in the interests of certainty. The big problem is to decide where to draw the line.

For the case to fall on the *Ramsay* side of the line it is first necessary that there should be a scheme. The House of Lords had little difficulty in holding that there had been a scheme in *Burmah* and one assumed that Vinelott J had equally little difficulty in reaching a similar conclusion in *Furness v Dawson*. What neither of these cases tackles is the way in which the courts are to define the limits of a scheme. Thus if it had been relevant, the Revenue might have argued that the transfer of the shares by *Burmah* to its subsidiary was itself part of an overall scheme notwithstanding the fact that tax considerations did not enter into their minds until some time later. One hopes that such a submission would get short shrift from the courts. After all, the way in which shares were to be retransferred or the problems that might arise at that time were not apparently within the contemplation of the parties when that first transfer was made. Likewise in *Furness v Dawson* one wonders whether the Revenue will now lie in wait until such time as shares in G are realised and then argue that the whole matter is a scheme; at present such an argument is unlikely as the whole point of the scheme in that case was to treat the shares in G as acquired at the original base cost of the shares in the taxpayer's family companies and thus defer rather than avoid the charge. However in the meantime the shareholders might decide to cease to be resident in the United Kingdom or they might die in which case the deferred charge would never be collected.

The second area of uncertainty comes from the magic phrase 'enduring legal effect' and its contrasting twin 'mere change of form' by means of which Vinelott J extricated himself from the *Burmah* case. That there is a distinction here seems clear; what is less clear is the nature of the effect that makes it enduring. In *Burmah* there was a legal effect in that equity was substituted for the debt; this was a mere change of form presumably because there were no other creditors of the subsidiary and no external shareholders. In such circumstances the legal effect is ignored. By contrast, in *Furness v Dawson* the legal effect was not one of mere form—despite the fact that 100% control existed—perhaps because company G was still in existence.

Some minor comments should be borne in mind when looking at these cases. First, it seems likely that much will turn on the Revenue's attempt to reconstruct the transaction. Where, as in *Burmah* and *Ramsay*, they can simply excise a transaction or a part of one they are more likely to succeed; where, as in *Furness v Dawson*, the reconstruction becomes more remote and looks like giving a tax result which is contrary to legal rights which still exist, it is less likely. Secondly, one is left with the feeling that much of the trouble stems from a perceived injustice in relation to the treatment of debts as distinct from debts on a security. The relief given by what is now CGTA 1979 s 136 is fairly limited and would not have been available in *Burmah* itself. Thirdly, there is the related problem of economic double taxation where a company makes a gain in that tax is levied both on the company, and in due course, on the shareholders without any credits being made available. This applies not only where shares are required for valuable consideration through the market but also where the shares are issued. A distinction is drawn in another area—that of the taxation of trusts—precisely in an attempt to avoid double taxation the distinction being that beneficial interests in trusts are not generally chargeable assets save where they are required for valuable consideration. Perhaps a similar distinction could be drawn here. One should

also note that the scheme in *Furness v Dawson* like that in *Ramsay* itself would now be stopped by the words of the statute book, CGTA ss 87 and 26 respectively. However, whereas s 87 contains a clearance procedure, s 26 does not.

Since *Furness v Dawson* two further decisions at first instance take a limiting view of *Ramsay*. In *Coates v Arndale Properties Ltd* [1982] STC 625 the question was whether a land dealing company had acquired property as trading stock. This question is the same as that which had been in issue in a series of cases more than 10 years earlier known as the dividend-stripping case. Goulding J took the view that those decisions exhausted the possibilities open to the Revenue. Applying those decisions either the transaction was a genuine purchase and sale of property and so a trading transaction or it was not. The *Ramsay* case could not be invoked to provide a reason for taking a transaction which was clearly a trading transaction on the earlier cases and depriving it of that character.

The other decision is that of Walton J in *Reed v Nova Securities Ltd* [1982] STC 724. Here there was a claim for group relief stemming from an appropriation of assets to stock in trade. The General Commissioners found as a fact that the taxpayer company had acquired the assets in the course of its trading in shares and securities and that the assets were acquired as trading stock and therefore allowed the taxpayer company to bring the assets in at their original base cost of nearly £4,000,000 notwithstanding that the current value was only some £30,000. The purpose behind the scheme was to take the difference between £4,000,000 and £30,000 as a trading loss in due course. The line of reasoning adopted by Walton J is familiar to those who have dealt with anti-avoidance provision in other tax systems. In essence Walton J was saying that the tax system gave the taxpayer an option to make this election and that a taxpayer who exercised his rights under that provision could not be said to be entering into transactions for the purpose of avoiding tax and so the transaction could not be undone. As Walton J said

> 'what I would point out is that in the series of tax avoidance cases proper, those cases in which the taxpayer had succeeded have all been cases where the form of the transaction has been precisely that which one would expect from a bare description of its nature, uncomplicated—undistorted, if you like—by any considerations based on tax: whereas in most cases where the transaction has been so distorted—that is to say, where unusual features have been included in an otherwise simple transaction in order to produce a particular tax result—the taxpayer has uniformly lost. And this is, indeed, exactly as it should be. A genuine transaction is a genuine transaction and should produce the taxation results which Parliament has enacted it should follow, however distasteful those results are to the Inland Revenue. An artificial transaction should, at the very least, be closely scrutinised to see whether it is what it purports to be; and, as Lord Greene MR said many years ago, a taxpayer who plays with fire cannot complain if his fingers get burnt.'

By way of postscript to these cases on avoidance one should note the following other decisions. First *Cairns v MacDiarmid*, described above, in which the *Ramsay* principle was not invoked at the first instance; secondly the decision of the House of Lords in *IRC v Pilkington* [1982] STC 103 where the House of Lords on a leapfrog appeal reversed the first instance decision and gave a very wide interpretation to a wide anti-avoidance provision thereby

avoiding any need to invoke a decision in *Ramsay* and thirdly the decision in *IRC v Aird Trustees of Sir John Aird* [1982] STC 245 where the Franco clause, a CTT avoidance device, was upheld and *Ramsay* was cited in argument although not in the judgment.

Business income—receipts

The 1982 cases in this area are illustrations of well-known principles rather than examples of strikingly new ones. There are three decisions on what amounts to a trading receipt. *Rolf v Nagel* [1982] STC 53 is a simple illustration of the point that a voluntary payment can be a trading receipt. In the particular case that taxpayer argued that the payment should be treated as non taxable on the analogy of the solatium cases—see *Simpson v John Reynolds & Co Insurances Ltd* [1975] STC 271. This argument was rejected since it was clear on the facts that the payment was for loss of trading profit: the court did not feel it necessary to decide whether the payment was indeed voluntary. *IRC v Biggar* [1982] STC 677 is a Scottish decision on the question whether a payment under the EEC dairy herd conversion scheme was a capital receipt on the ground that it was a restriction of profit-making opportunities or, rather, was a trading receipt as being compensation for loss of profit while the conversion from dairy to beef cattle was being carried through. The decision was reached on an analysis of the terms of the scheme and that analysis showed clearly that it was to be a trading receipt. *Cooper v C & J Clarke Ltd* [1982] STC 335 is a nice illustration of the tax problems that arise when a trader has spare cash and invests in short term in purchase of securities. In the case the securities were sold at a large loss and the taxpayer claimed to deduct that sum as a loss arising from a separate trade of dealing in securities. This claim was allowed by the General Commissioners and Nourse J decided that as it was pre-eminently a matter of fact and therefore one for the Commissioners to evaluate, the court could not interfere unless the Commissioners' conclusion was clearly wrong. It is perhaps interesting to note that no attempt was made to argue that these losses arose as incidental transactions in the main trade; profits on such transactions have been treated as the profits of the principal trade in cases concerning banks and insurance companies.

Deductions

Cases on the scope of gratuitous payments as trading receipts have sometimes involved brewery companies which have made payments to tenants on the termination of their leases. *Watney Combe Reid & Co Ltd v Pike* [1982] STC 733 is a case on the other side of this particular coin—whether the payments made by the brewery company are deductible. On the facts of the case the payments were held to be capital and so not deductible. However this decision turns very much on the facts of the particular case where the public houses were being taken into management by the brewery group and let to management company members of the group. These facts meant first that the expenditure was made for a dual purpose and therefore was not deductible under TA 1970 s 130(a) and secondly that the payment was indeed one of capital since, although no new assets were created or existing ones enhanced, the purpose was to facilitate the replacement of the tied tenants by the

management companies in order to exploit the premises in an entirely new way with a view to effecting a permanent improvement in profits. The other decision of interest on deductions is *Walker v Joint Credit Card Co Ltd* [1982] STC 427. Here a payment was made by a company to a business rival in order to effect the total closure of that rival leaving the taxpayer company as the unchallenged member of a group running a particular business. It was held that the sum paid and the related legal expenses must therefore be treated as having been paid on capital account. *Olin Energy Systems Ltd v Scorer* [1982] STC 800, is a nice illustration of the point that an expense incurred for the purposes of one trade is deductible only in computing the profits of that trade and cannot be set off against profits of another trade run by the taxpayer even though there are beneficial side-effects to the trade.

Business income—scope

The decision of Warner J in *Webb v Conelee Properties Ltd* [1982] STC 913 illustrates the importance of the Schedular system in the United Kingdom taxation. The taxpayer company acquired properties, found licensees to occupy them and manage the properties. The court held that the activities of the company did not amount to a trade which left the company with the status of an investment company with the result that a particular loss was not deductible in computing its profits.

Corporation tax

Corporation tax contained three interesting cases. The first was the decision of the Court of Appeal in *Conservative & Unionist Central Office v Burrell* [1982] 2 All ER 1, concerning the legal status of the Conservative party. The Court of Appeal held that the party was not an unincorporated association in the context of TA 1970 s 526(5) and therefore the Central Office was not subject to corporation tax. See, further, p 313, post.

In *Wilson & Garden Ltd v IRC* [1982] 3 All ER 219 the House of Lords held that in considering the liability of a close company to an apportionment of its income, it was permissible in determining what constituted the current requirements of the taxpayer company's business and such other requirements that might be necessary or advisable for the maintenance and development of that business to have regard not only to the business which the taxpayer company was actually carrying on but also to whatever was genuinely in the contemplation of the taxpayer company at the relevant date as being then required for the future maintenance and development of the business in whatever form the taxpayer company might think desirable.

The third case, *Wilcox v Frigate Investments Ltd* [1982] STC 198, is an important decision on definition of charge of income. For some time it has been unclear whether interest should be treated as a deduction in computing profits or as a charge on income. Revenue practice on this has vacillated. However in this case the court held that a sum which is deductible in computing the profits of a trade—in this case interest on a loan raised to purchase land—was deductible from trading profits and therefore not deductible as a charge on income. The question in issue of the case was whether the interest payment could be set against rental income which the company

had received. No evidence was given to the court as to whether, as a matter of ordinary commercial accounting principles, an interest payment could be so deducted.

Capital gains tax

Capital gains tax saw relatively few developments apart from those already listed above under the heading 'Tax avoidance schemes'. Probably the most important was the decision of the House of Lords in *Stanton v Drayton Commercial Investment Co Ltd* [1982] 2 All ER 942 in which the House of Lords upheld the Court of Appeal. This decision is not only important but also exceedingly sensible as it relates to a common situation and provides a rule which gives the parties involved a necessary degree of certainty when planning a commercial transaction. In the case the taxpayer company agreed to buy a portfolio of investments at a price to be satisfied by the allotment of a certain number of shares at a fixed price. The agreement was made conditionally upon the passing of a resolution by the members of the taxpayer company creating the new shares and the Stock Exchange granting permission to deal in and a quotation for the new shares by a certain date. The sum stated in the agreement was 160p per share but when the shares where first quoted on the Stock Exchange their market price was then 125p per share. The Crown argued that they could substitute the market value of the shares when first dealt in for that reached by the parties. However the House of Lords held that as the agreed value of the shares was honestly reached by way of a bargain made at arm's length, the figure taken should be that in the agreement.

Aspden v Hildesely [1982] STC 206 is an interesting but, one would have thought, inevitable decision. The case concerns the nature of a consent order for the transfer of property between spouses who are in the process of getting a divorce and was complicated by the obligation descending on the wife's personal representative, in the event of her dying before a certain date, to hand back a sum equal to one half of the then equity in the property and, in the event of her disposing of the property before that date and the lifetime of the taxpayer, to retain assets to enable her to carry out that undertaking. The court held that as the consent order was expressed to be made 'forthwith' and was not conditional on the making of the decree absolute it operated as an immediate disposition for capital gains tax purposes and was to be regarded as taking effect under a contract. Analysing the wife's obligation the court held that the taxpayer had no interest left in the property since he had only a contingent right to a sum of money should she die within the period and a breach of the wife's undertaking could not be regarded as giving him the right to set this transfer aside. For this reason the disposal could not be regarded as a transfer of interest. The disposal could not be regarded as a transfer by way of security either since a transfer by way of security was a transfer of property to secure compliance with an obligation on the performance of which the property would revert to the transferor.

There are two CTG cases in relation to settlements calling for mention. In the simpler, *Bond v Pickford* [1982] STC 403, the court had to decide whether the execution of a deed of allocation allocating part of the trust property to beneficiaries in exercise of the power, the allocated property to be held by

trustees on trust for the beneficiaries absolutely if each one of them attained the age of 22, was effective to create separate settlements in the light of the decision of the House of Lords in *Roome v Edwards* [1981] STC 96. On the facts Nourse J concluded that the deeds of allocation did not create separate settlements.

In *Berry v Warnett* [1982] 2 All ER 630 the House of Lords held that the transfer to trustees under FA 1965 s 25, now CGTA 1979 s 53, applied to make the taxpayer as settlor liable to capital gains tax on the basis that the entire fund had been disposed of notwithstanding that he received a life interest in return on the creation of the settlement. The correct analysis of the transaction was that the property was transferred to the trustees and then the life interest came into being in favour of the taxpayer. It could not be said that he had simply settled the reversion. One should note that FA 1981 s 86 had amended CGTA s 53 so that the expression a gift in settlement had become a transfer into settlement, a formula which would have prevented any argument along the lines advanced by the taxpayer in that case.

Capital transfer tax

Two decisions call for comment, although brief comment. First in *IRC v Sir John Aird's Settlement Trustees (No 2)* [1982] STC 544 Norse J held, as had been generally believed by everyone except the Revenue, that an appointment made on 9 May 1974 ie before the coming into force of the 1975 Act could not amount to a capital distribution and therefore could not be a distribution payment for the purposes of FA 1975 Schedule 5 Para 8(2). The same trust had been considered by Nourse J earlier when, at 1982 STC 245, he upheld the so-called Franco scheme, a scheme deprived of any effect for later deaths by FA 1976. More general interest may be found in a decision of the Court of Appeal in *IRC v Stype Investments (Jersey) Ltd* [1982] STC 625. This case, which attracted considerable press attention, involved the activities of a company which paid money to its own bank account in Jersey. The company held land in England as a bare trustee for a UK beneficiary, C. It was agreed to sell the property but C died before completion of the sale had taken place. The bare trustee arranged for the proceeds of the sale of the land to be remitted to its bank account in Jersey, which is outside the UK tax jurisdiction. The Court of Appeal held that the rights held by C in this land at the moment of his death were property situate in England and that since the land was in England the rights to specific performance and damages under the contract were enforceable—and only enforceable—in England and so were also situate in England. It followed that the rights belonged to C's personal representative in England and that the bare trustee by its act had constituted itself an executor de son tort and so liable to the Revenue for the CTT in respect of those proceeds under FA 1975 s 25(6).

Anti-avoidance provisions

Three decisions in the year merit some mention. First, in order of seniority, is the decision of the House of Lords in *Leedale v Lewis* [1982] 3 All ER 808, a decision now of only historic interest in view of the new rules introduced by FA 1981. The decision concerned FA 1965 s 42 (later to become CGTA s 17).

The decision of the House of Lords upholding the earlier decisions of Dillon J and the Court of Appeal left the Revenue with a broad but commonsense basis on which to apportion liabilities among beneficiaries; the insistence on looking at what was really likely to happen under the settlement is surely sensible.

One may be able to find less sense in the decision of the Inland Revenue to litigate the case reported as *IRC v Levy* [1982] STC 442. This concerns the definition of settlement of the purposes of the anti-avoidance provisions—TA 1970 s 454. The taxpayer made an interest free loan to a company wholly owned by him; the company invested the money loaned. The Revenue wanted to treat the income derived by the company from the investment as income of the settlor. Nourse J held that a commercial transaction devoid of any element of bounty was not a settlement within s 454 and the Revenue case was dismissed with properly short shrift. The case is also important for the explanation of some of the comments in *Chinn v Collins* [1981] 1 All ER 189.

The decision of Walton J in *IRC v Pratt* [1982] STC 756 shows the courts applying the principles to be discerned from the decision of the House of Lords in *Vestey v IRC* [1979] 3 All ER 976. The present case concerned what is now TA 1970 s 478 and the court held that that provision could not apply in the case of multiple transferors of assets if the respective interests in the assets could not be separated out and clearly identified since there would then be no proper bases on which the charge could be made. A similar reason explained why discretionary beneficiaries could not be charged under that section. There was the further point on the facts that the taxpayers involved not having procured the transfer of the assets abroad could not be said to be transferors anyway and the conclusion reached by the Commissioners was one which they were entitled to reach.

Conclusion

Four general points may be made in conclusion on the year. First there is the point heavily stressed above that the courts are still struggling to make sense of the decision of the House of Lords in *Ramsay*. Litigation in this area is bound to go on for some time. The second point is the unsatisfactory nature of the present appeal process. This is shown most strikingly in the decision of the House of Lords in *Cole Bros Ltd v Phillips* [1982] 2 All ER 247 where the members of the House of Lords, left to themselves, might well have decided the facts differently from the Commissioners. While Nourse J did not indicate that he would have reached a different conclusion had he been faced with the decision in *Cooper v C & J Clarke Ltd* [1982] STC 335 such a conclusion was not impossible; however one doubts whether Walton J would have done anything but agree with the Commissioners in *IRC v Pratt*. One wonders whether an appeal structure which leaves the appellate courts with such relatively limited powers should be tolerated much longer. This is particularly true in a case such as *Cole Bros Ltd v Phillips*. Thirdly there is an element running through the judgments, particularly at the higher levels, of seeking to de-mystify or even de-intellectualise the law. Questions are being treated as broad issues. Again *Cole Bros Ltd v Phillips* is a good example of this trend. As always this is a matter of balance. The law must be found in the words of the statute rather than in glosses on that statute but sometimes the

courts could be more helpful in providing guidance on matters such as the definition of plant and machinery. Simply to say that these are questions of fact to be determined broadly by the Commissioners seems unhelpful given the varying degreees of expertise in these essentially amateur bodies. Lastly one may note the reappearance of judicial criticism of cases involving small sums of money. This was made by Walton J in *Donnelly v Williamson* where the amount at stake was very small but the matter was regarded as a test case by the Inland Revenue and by the union to which the teacher involved belonged. Much research has been done by criminologists into the exercise of police discretion to prosecute in particular cases. One wonders whether similar research into the revenue decision to litigate particular cases is not overdue. However there seems less ground for anxiety in a case such as *Donnelly v Williamson* where each party is properly financed and where what is sought is a firm ruling by the courts which can then be applied to a wide sector of the community.

Tort

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Introduction

The reports in 1982 were dominated by decisions of the House of Lords on liability for nervous shock and for economic loss caused by negligence. No apology is needed for devoting most of this review to these and related cases. Other reported cases of note concerned claims in respect of 'wrongful life' and 'wrongful birth', the duty of care of police officers in hot pursuit of suspects, the test for determining causal issues, the interpretation of s 1(2) of the Occupiers' Liability Act 1957, and s 2(2)(b) of the Animals Act 1971, the scope of the tort of deliberate interference with trade by unlawful means, the rules in an action of trover as to finding of chattels, injunctions to stop publication of an alleged libel, and contribution between tortfeasors.

Negligence

Nervous shock

McCloughlin v O'Brian [1982] 2 All ER 299 (HL) is only the second case to have reached the House of Lords on the question of liability for nervous shock, the 'hallowed expression' (per Lord Wilberforce at 301 e) by which 'lawyers quaintly persist in calling' recognisable psychiatric illness (per Lord Bridge of Harwich at 312 e). Ever since *Hay (or Bourhill) v Young* [1942] 2 All ER 396, [1943] AC 92 (HL) there have been two theories of liability. According to the 'impact theory' (supported by the speeches of Lords Thankerton, Russell and Macmillan) shock is only an extension of physical injury and before he can recover for shock-induced illness the plaintiff must show that he was within the area of reasonably foreseeable physical injury by impact. According to the 'shock theory' (supported by the speeches of Lords Wright and Porter) nervous shock is a distinct kind of damage and the only test is that of reasonable foreseeability of the plaintiff being injured by nervous shock as a result of the defendant's negligence. Most English, Commonwealth, and American cases since *Hay (or Bourhill) v Young* have tended to support the 'shock theory'. In *McCloughlin v O'Brian*, the House of Lords has unanimously and resoundingly adopted that theory as the basic principle, but the speeches of their Lordships show remarkable differences of opinion on the role of policy in limiting the reasonable foresight test in relation to nervous shock. The disagreement makes it difficult to predict the *degree* of temporal, spatial and emotional proximity which will in future be required in order to establish liability.

The precise issue before the House was whether someone

> 'who was not present at the scene of grievous injuries to her family but who comes on those injuries at an interval of time and space, can recover damages for nervous shock' (per Lord Wilberforce at 301 f).

The plaintiff's husband and three of her children were injured in a collision due to the admitted negligence of the first defendant, the driver of a lorry, employed by the second defendants. At the time the plaintiff was at her home about two miles away. Two hours later the accident was reported to her and she was taken to the hospital, where she was told that her youngest daughter was dead and she saw the other injured members of her family in circumstances that were 'distressing in the extreme and were capable of producing an effect going well beyond that of grief and sorrow' (at 301 b). At the trial it was assumed that the plaintiff subsequently suffered from severe shock, organic depression and a change of personality.

Boreham J held that the defendants owed no duty of care to the plaintiff because injury by shock was not reasonably foreseeable. The Court of Appeal (see [1981] 1 All ER 809, [1981] QB 599) upheld the judgment for the defendants, but on different grounds. It was decided that although the shock to the plaintiff was reasonably foreseeable, considerations of public policy should lead to the rejection of her claim, and to the limitation of the duty to those on or near the highway at or near the time of the accident. The House of Lords agreed that the shock was reasonably foreseeable, but disagreed with the Court of Appeal's view that there were policy considerations sufficient to negative the prima facie duty of care owed to the plaintiff. In particular, the arguments that this would open the floodgates and that it would add the anxieties of litigation to the suffering of nervous shock were emphatically rejected.

The first point of disagreement in their Lordships' speeches is whether or not the policy issue is justiciable at all. Lord Scarman while apparently conceding that 'policy considerations will have to be weighed' when formulating principles (at 310 g) explicitly denied that policy could justify a judicial decision where to draw the line (at 311 f). Lord Bridge of Harwich, whose speech Lord Scarman said 'cannot be improved or strengthened' (at 310 d), similarly took the view that

> 'in this area of the law there are no policy considerations sufficient to justify limiting the liability of negligent tortfeasors to some narrower criterion than that of reasonable foreseeability' (at 320 h).

While Lord Russell 'would not shrink from regarding in an appropriate case policy as something which may feature in a judicial decision' (at 310 a), he was plainly unwilling to support policy arguments for limiting liability for nervous shock. On the other hand, Lord Edmund-Davies emphatically rejected the views of Lord Scarman and Lord Bridge as running 'counter to well-established and wholly acceptable law' (at 308 g). He cited a number of examples of policy-based decisions and concluded that 'public policy issues *are* "justiciable"' (at 309 c). However, he conceded that

> 'any invocation of policy calls for the closest scrutiny, and the defendant might well fail to discharge the burden of making it good' (at 307 j).

Similarly, Lord Wilberforce, reiterating the two-stage approach to the imposition of a duty of care which he articulated in *Anns v Merton London Borough* [1977] 2 All ER 492 at 498, [1978] AC 728 at 751–752, thought it clear that 'foreseeability does not of itself and automatically, lead to a duty of care,' (at 303 h).

The essence of the disagreement is whether once a principle, such as reasonable foreseeability of nervous shock, has been established, policy considerations, such as the fear of opening the floodgates of litigation, should lead to the exclusion or restriction of liability as a matter of law. The significance of the two-stage approach adopted in *Anns* (and Lord Reid's earlier statement of principle in *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294 at 297 h; [1970] AC 1004 at 1027) was that it shifted the 'neighbour principle' from being an argument to support new areas of liability, if there were policy considerations in favour of doing so, into a principle which would apply, unless there was a policy justification for excluding it. The onus of argument was shifted, with 'policy' operating only as a long-stop where the logical application of the factual test of reasonable foreseeability would lead to obviously undesirable social or financial consequences. Lord Scarman's rejection of this 'policy' limitation puts a weight upon the 'neighbour principle' which it was never intended to bear. His reason for doing so was, in effect, the belief that the forensic process is not suited to deciding upon desirable goals or the means of achieving them. It is precisely this belief that has led many critics of the present fault-based tort system of compensation for personal injuries (including psychiatric illness), to favour a no-fault social security system. But to draw a hard-and-fast line between 'policy' and 'principle' within the context of the present fault-based tort system is artificial and unconvincing. To state a 'principle' of liability to all reasonably foreseeable 'neighbours' is to enunciate a presupposed policy goal for the shifting or distribution of losses; to state a policy that losses should be shifted or distributed in this way is to state a principle. Policy and principle are inextricably linked.

The second point of disagreement in the speeches is over the *degree* of proximity, in temporal, spatial and emotional terms, required to establish liability for nervous shock. Lord Wilberforce (at 302 d and 304 j) was anxious to make it clear that on its facts *McCloughlin v O'Brian* represented no major extension of liability, since he regarded this as a case in which a mother (well-established as a recognised category of plaintiff: see *Hambrook v Stokes Bros* [1925] 1 KB 141, [1924] All ER Rep 110) had come on the 'immediate aftermath', a situation which he thought was akin to *Boardman v Sanderson* [1964] 1 WLR 1317, although in fact in that case, unlike *McCloughlin v O'Brian*, the father actually *heard* the scream of his son and rushed out of the office at the scene of the accident to help release his foot from under the defendant's vehicle. He (at 302 f) and Lord Edmund-Davies (at 306 f) also treated the case of a mother comforting her family in hospital immediately after an accident as indistinguishable from the rescuer case of *Chadwick v British Transport Commission* [1967] 2 All ER 945, [1967] 1 WLR 912. Lord Wilberforce said there would have to be very careful scrutiny before the extension of liability to any class of persons other than parent and child or husband and wife, and he would exclude the ordinary bystander (at 304 f–h). 'As regards proximity to the accident, it is obvious that this must be close in both time and space', possibly excluding even the case where a child's body was found floating in a trench after a prolonged search as in *Chester v Waverley Municipal Council* (1939) 62 CLR 1 (at 304 j–305 a). And apart from the 'immediate aftermath' and 'rescuer' situations, a 'strict test of proximity by sight or hearing should be applied' (at 305 b), although he left open whether

'some equivalent of sight and hearing, eg through simultaneous television would suffice' (at 305 c).

On the other hand, Lord Bridge (at 317 h–j, 319 g–j, 320 e–j), Lord Scarman (at 311 c–d) and Lord Russell (at 310 b–h), adopted a far more flexible and open-ended approach. According to their view factors of space, time and the relationship of the plaintiff to the victim as well as the nature of the victim's injuries are all relevant as affecting the degree of reasonable foresight and this is left to the good sense of the judge, 'enlightened by progressive awareness of mental illness' (at 320 g). On this approach the only decided case in which a different result would clearly be reached today is *King v Phillips* [1953] 1 All ER 617, [1953] 1 QB 429 (see Lord Bridge at 316 c) since it would now be said that a defendant must reasonably foresee that the mother in the vicinity of an accident to her small child will suffer emotional trauma. In principle there is no reason why other relationships should not be admitted, such as the fiancée in *Currie v Wardrop* 1927 SC 538, and the fellow-employee in *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271 (neither of these decisions was referred to in the instant case). However, the ordinary bystander, as in *Hay (or Bourhill) v Young* is highly unlikely to recover because he or she is assumed to be reasonably strong-nerved and able to withstand the horrors of daily life. But it is implicit in both *Chadwick v British Transport Commission* and *Dooley v Cammell Laird & Co Ltd* that if an accident is so gruesome that it is reasonably foreseeable that even a spectator would suffer nervous shock, he or she may be allowed to recover (see Lord Bridge at 320 c–d). It has been suggested, by Harvey Teff, 'Liability for Negligently Inflicted Nervous Shock' (1983) 99 LQR 100 at 104 that, from a medical viewpoint,

> 'the crucial determinant of whether the plaintiff is so affected as to suffer from a "recognisable psychiatric illness" is almost invariably the nature of his relationship with the victim'.

If evidence to this effect is produced in future nervous shock cases, we may expect that the degree of intimacy between the plaintiff and the victim and the nature of the injuries will be of particular importance.

The approach of the majority to the relevance of the means by which there is an impact upon the senses is instructive. Lord Bridge (at 320 a–b) illustrates the injustice of hard-and-fast lines of policy by the case of a mother who knows that her husband and children are staying in a hotel and reads in the newspaper that there has been a fire, sees a photograph of unidentifiable victims and on being told shortly afterwards that all her family have perished suffers an acute psychiatric illness. Lord Bridge recognises that such an illness could be regarded as reasonably foreseeable (a conclusion which, it is submitted, is indirectly supported by the dissenting judgment of Rinfret CJC in *Guay v Sun Publishing Co Ltd* [1953] 2 SCR 16, [1953] 4 DLR 377).

One may conclude that the most important result of *McCloughlin v O'Brian* is to remove cases of nervous shock from any special categorisation in the law of negligence. The control of liability is to operate at the level of fact-finding. The requirement of 'recognisable psychiatric illness', excluding ordinary grief and transitory distress, excludes most potential claims, and trial judges are (for the reasons given by Lord Bridge at 312 b–h) likely to continue to treat the issue of causation as very much within their own province rather than that of medical experts.

For further comment, see A C Hutchinson and D Morgan (1982) 45 MLR 693, Harvey Teff (1983) 99 LQR 100, C Lewis, 79 L S Gaz 1004.

Wrongful life and wrongful birth

The reluctance of the House of Lords to invoke public policy as a ground for limiting liability in *McCloughlin v O'Brian* (above) was not shared by the Court of Appeal in *McKay v Essex Area Health Authority* [1982] 2 All ER 771 when rejecting a child's cause of action for what the Americans call 'wrongful life'. Mary McKay was born in 1975 with various disabilities, including partial blindness and deafness, because she was infected while in her mother's womb with German measles. She and her mother alleged negligence on the part of the doctor and health authority in failing to diagnose and treat the infection and to advise the mother on the desirability of an abortion, which she would have had. The child claimed damages *inter alia* for her 'entry into a life in which her injuries [were] highly debilitating'. The Court of Appeal unanimously held that this claim showed no reasonable cause of action and, by a majority (Griffiths LJ believing the matter should go to trial for procedural reasons), struck it out.

The decision is 'one-off', because the court held that, in respect of births after 22 July 1976, the wording of s 1(2)(b) of the Congenital Disabilities (Civil Liability) Act 1976 precludes actions for 'wrongful life', and s 4(5) abolishes the common law. Nevertheless the decision will be of interest in those common law jurisdictions where no statutory provisions exist. It was conceded that at common law a duty of care is owed to an unborn child not to injure it. But it did not follow that there was a legal duty to the foetus to terminate its life. Such a duty was rejected, as it has been in many American jurisdictions, on the grounds that it would be contrary to public policy as a violation of the sanctity of life.

There was also a claim by the child's mother in respect of 'wrongful birth', that she had been burdened with a child with serious congenital disabilities and had suffered distress, loss and damage. It was conceded that this was an arguable claim, and Stephenson LJ suggested (at 779 f) that if successful this would give the child 'some compensation in money and care'. A wrongful birth action has previously been allowed (*Sciurraga v Powell* 24 July 1980, unreported, CA) but in *Undale v Bloomsbury Area Health Authority* (1983) Times, 18 February, Jupp J has now held that it would be contrary to public policy to award the mother damages for the cost of raising an 'unwanted' child.

For further comment see Tony Weir [1982] CLJ 225, Gerald Robertson (1982) 45 MLR 697, C Lewis, 79 L S Gaz 839, Michael Slade (1982) 131 NLJ 874.

Economic loss

The decision of the House of Lords in *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 201 (HL) has already been described as 'a milestone in the development of the law of negligence' (by Michael Jones (1982) 132 NLJ 1091), as having 'staggering implications for the law of contracts and products liability' (by J C Smith and Peter Burns (1983) 46 MLR 147 at 153), and as

'throwing doubt upon the traditional division between contract and tort' (by N E Palmer and J R Murdoch (1983) 46 MLR 213 at 214). Unhappily, as in so many other recent decisions, the House of Lords has left 'behind a trail of judicial authorities of undecided authoritative status' W[edderburn] (1983) 46 MLR at 230), and it will take years of litigation before the real significance of the case can be assessed.

The assumed facts were that in 1969–70 the pursuers contracted with a firm of builders to construct a factory for them at Grangemouth. The pursuers' architects nominated the defenders as specialist sub-contractors to lay composition flooring in the main production area of the factory. The defenders entered into a contract with the builders, and not with the pursuers, to carry out this work. It was averred that, owing to the negligence of the defenders, the floor became so defective that two years after it had been laid it developed cracks. It was not suggested that there was a danger to the health and safety of any persons, nor that there was actual or threatened damage to any other property of the pursuers. The entire floor surface required replacement to avoid the cost of continual maintenance which would be more expensive than immediate replacement. The pursuers claimed (1) the cost of replacement of the floor surface; and (2) the consequential economic or financial loss arising from storing their books elsewhere, and moving machinery, loss of profits, payment of wages to employees, and overheads, during the period of treatment.

The Lord Ordinary (Grieve), the Court of Session (1982 SLT 333) and the House of Lords (Lord Brandon of Oakbrook dissenting) held that these averments disclosed a cause of action. The case was argued as one in delict, it being common ground that the relevant principles of English and Scots law are identical. The reports are silent as to why the pursuers had not proceeded against the builders in contract, nor indeed why they did not follow the obvious course of alleging a collateral contract with the defenders, who were nominated sub-contractors. The defenders conceded that there was a sufficient degree of proximity between them and the pursuers so as to place a duty of care upon them in favour of the pursuers in the work of laying the floor. The only issue in dispute was whether that duty extended to the *kind* of damage in suit.

The initial problem of classifying the damage was a source of much confusion and uncertainty in the arguments and judgments. The importance of classification stems, on the one hand, from the express limitation of the neighbour principle in *Donoghue v Stevenson* [1932] AC 562, [1932] All ER Rep 1, to physical damage to persons and property, and, on the other hand from the limitation which the courts have imposed on the principle of reliance in *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1963] 2 All ER 573, [1964] AC 465, to negligent *statements* causing economic loss. The arbitrariness of the line between 'statements' and 'acts', and between 'physical' damage and 'economic' loss, has, in the last decade led to the recognition of a duty of care in a number of situations where the damage is not unequivocally 'physical' and there has been a negligent act rather than a statement, such as *Dutton v Bognor Regis United Building Co Ltd* [1972] 1 All ER 462, [1972] 1 QB 373, *Anns v Merton London Borough* [1977] 2 All ER 492, [1977] AC 728, and *Batty v Metropolitan Property Realizations Ltd* [1978] 2 All ER 445, [1978] QB 554. It has been a matter for debate whether these cases simply reflect an

expansive conception of 'physical' damage, or are genuine exceptions to a rule of non-liability for negligent acts causing economic loss. The Lord Ordinary (1982 SLT at 340) and the Court of Session (ibid at 342, 343) were willing, as an alternative basis of their decision, to regard the cracks in the top layer of the floor as damage to property upon which all the economic losses were consequential, and rejected a suggested qualification that the damage had to be to property of the pursuers other than the property on which they had been working. On the Court of Session's approach the only claim excluded in delict would be for financial loss following damage to somebody else's property (*Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1972] 3 All ER 557, [1973] QB 27) or person (*Reavis v Clan Line Steamers* 1925 SLT at 540).

However, in the House of Lords all their Lordships regarded this as a case in which there was no 'physical' damage, nor was the loss incurred in preventing or mitigating danger to the health and safety of any person or damage to any other property of the owner. A majority (Lord Fraser of Tullybelton at 203 e, 204 d–h, Lord Roskill at 213 f–214 f and j–215 a, with both of whom Lord Russell agreed at 205 c) extended the duty of care beyond this recognised situation, of a duty to prevent harm being done by faulty work, to a duty to avoid such faults being present in the work itself, so that the producer is liable for economic losses even in the absence of a contractual relationship. Although Lord Fraser (at 204 f) surprisingly claimed that the 'case seems to me to fall well within limits already recognised in principle for this type of claim', Lord Roskill (at 214 e) correctly recognised the novelty of what he saw as this 'next logical step forward in the development of this branch of the law'. The majority rejected any difference in principle between economic loss and economic loss caused by physical damage. This conclusion was reached by applying the two-stage approach articulated by Lord Wilberforce in *Anns*. There was a prima facie *Donoghue v Stevenson* duty because of the admitted proximity of the parties (as elaborated at 204 e, 213 j–214 b), and the 'floodgates' arguments as well as other policy objections to liability were rejected (at 204 a–d, 212 h–213 j). Lord Brandon of Oakbrook (at 217 c–218 h) dissented because he took a different view on policy grounds. Lord Keith of Kinkel concurred with the majority decision but on the different and narrower ground that the earlier authorities permitted recovery of the expenditure in averting economic loss and this could include the loss of profits caused by the extra burden of maintaining a defective floor (at 206 a–h). This ground seems insupportable in view of the admitted absence in the present case of danger to health and safety of persons and property. On the broader issue of liability for safe but shoddy goods, Lord Keith (at 207 a–f) agreed with Lord Brandon that for policy reasons there should be no duty of care.

If there is no longer a difference in principle between physical damage and economic loss, what is the *degree* of proximity required? Here it is interesting to note that *Hedley Byrne & Co v Heller and Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, was invoked to *limit* the scope of the duty. Lord Roskill said the concept of proximity 'must always involve, at least in most cases, some degree of reliance' (at 214 f) and he and Lord Fraser (at 204 d–e) emphasised that in the present case the relationship fell only just short of contract, and there was reliance on the skill and judgment of the sub-contractors. The

imprecise nature of the reliance test is obvious when one examines the highly questionable view of Lords Fraser and Roskill that in most cases an ordinary consumer of products would be denied recovery on the ground that he had relied upon the retail seller rather than the manufacturer (see the section on consumer law below, and (1983) 46 MLR at 216–217). Moreover, we are not given any clue as to how cases in which there is no element of reliance on the defendant's act fit into the picture. Surprisingly no reference was made by their Lordships to *Ross v Caunters* [1979] 3 All ER 580, [1980] Ch 297, where Megarry V-C allowed an intended beneficiary to recover for loss of a prospective gain against solicitors who had been negligent in the preparation of a will, nor to *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 233, in which a clerk for whom a local authority was liable owed a duty of care to any person whom he knew or ought to have known might suffer economic loss as a result of his mistake. We are left with no more than Lord Fraser's doubt (at 204 c–d) as to the correctness of the test suggested by Gibbs and Mason JJ in the High Court of Australia in *Caltex Oil (Australia) Pty Ltd v Dredge Willemstad* (1976) 136 CLR 529, that the defendant must know that a particular person, not merely as a member of an unascertained class, would be likely to suffer economic loss in consequence of his negligence. The relationship between the *Donoghue v Stevenson* and *Hedley Byrne* principles thus remains unclear, with caution rather than logic characterising their Lordships' speeches.

Similarly, despite the frequent references to *Dutton* and *Anns*, there was no systematic analysis of the consequences of the decision for the liability of house builders to second and subsequent purchasers. There is no direct support for the view that a negligent builder is now liable to subsequent purchasers for diminution in value resulting from a defect which neither caused nor threatened physical danger (cf T I Bailey (1981) 131 NLJ 671), but, arguably, this is an implication of the majority's reasoning.

Even more bewildering is Lord Roskill's hint (at 214 j) that the *Spartan Steel* case might be differently decided. If 'reliance' is not the touchstone of liability it is difficult to equate the present case in which there was reliance upon another person's due performance of his contract with a third party, with a case in which negligent interruption of an electricity supply affects an unascertained class of consumers. As Lloyd J earlier pointed out in *Schifart und Kohlen GmbH v Chelsea Maritime Ltd, The Irene's Success* [1982] 1 All ER 218 at 222 e, there is a distinction between the case in which the economic loss suffered is at one remove from physical damage to property, and one where it is the 'direct reflection' of that damage. This led him to the conclusion that cif buyers of cargo being shipped on board the defendant's ship could sue in respect of damage to the cargo due to the alleged negligence of the defendants, although the buyers were not yet owners of the goods. In so doing he declined to follow the decision of Roskill J (as he then was) in *Margarine Union Gmbh v Cambay Prince Steamship Co Ltd, The Wear Breeze* [1967] 3 All ER 775, [1969] 1 QB 219. A rational law of tort must surely distinguish between economic loss in a situation 'equivalent to contract', and a situation in which the plaintiff's loss arises from a relational interest. (The importance of the element of reliance is also indirectly supported by the earlier decision of the Court of Appeal in *Forster v Outred & Co (a firm)* [1982] 2 All ER 753, in which it was held that in cases of financial loss due to a solicitor's negligence the

damage crystallises and the cause of action is complete at the date when the plaintiff, in reliance on negligent advice, acts to his detriment by incurring a contingent liability which is capable of assessment. But the correctness of this appears to be doubted in *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 1 All ER 65, HL, at 72 b).

How is the standard of care to be ascertained in cases where the duty in tort is derived from a contractual obligation to a third party? The difficulties of deriving a standard from the contract (eg between the purchaser and the retail seller in the case of manufactured goods) were thought by Lord Brandon (at 218 e–h) and Lord Keith (at 207 f) to be too great to permit even the existence of a duty situation. But Lord Fraser (at 204 g–205 b) and Lord Roskill (at 214 d) were content to say, in fairly general terms, that the standard of care has to be judged largely by reference to the contract. According to Lord Fraser,

> 'however jerry-built the product, the purchaser would not be entitled to damages from the builder if it came up to the contractual standard' (at 205 a),

but he left open the position of a subsequent owner unaware of the contractual duties. Lord Roskill ventured the view that relevant exclusion clauses in the contract would limit the duty in tort, but emphasised that the point did not have to be decided in the present case. Presumably, in the absence of any limitation in the contract, the standard of care will be, as Lord Brandon (at 218 c) suggested, to make the goods

> 'as well designed, as merchantable and as fit for their contemplated purpose as the exercise of reasonable care could make them'.

A host of other problems remain unresolved, for example whether the defendant may be excused from his duty in tort if the contract with the third party has been terminated (eg on grounds of frustration or fundamental breach) or he has otherwise been relieved of his obligation to the contracting party to perform. (For the possible effects on torts of deliberate infliction of economic loss, see below.)

In short, *Junior Books* has opened a Pandora's box. It can hardly be regarded as satisfactory that this should have been done by the highest court without an exhaustive consideration of principle of the kind undertaken in the *Caltex* case in the High Court of Australia, and without a full consideration of the policy implications. One may sympathise with Lord Keith's view (at 207 e), that the policy considerations are better left to the legislature. But if 'principle' is to be 'logically' developed by the courts then it cannot be done while ignoring the wider issues such as whether producers are the best cost avoiders, and if so, whether an extension of fault-based rather than strict liability is the best method of distributing the economic losses involved (cf the proposals of the Pearson Committee, (Cmnd 7054) para 1236 for strict liability in respect of defective products causing death or personal injury).

For further comment see N E Palmer and J R Murdoch (1983) 46 MLR 213, M Jones (1982) 132 NLJ 1091.

Negligent exercise of statutory powers

In *Dennis v Charnwood Borough Council* [1982] 3 All ER 486, the Court of

Appeal applied the decision in *Anns v Merton London Borough* [1977] 2 All ER 492, [1978] AC 728 to the negligence of a local authority in failing to use reasonable care in considering and approving plans.

Postscript The decision in this case as to when time begins to run for purposes of limitation must now be read subject to *Pirelli General Cable Works Ltd v Oscar Faber and Partners (a firm)* [1983] 1 All ER 65, HL.

Immunity for police officers?

In *Marshall v Osmond* [1982] 2 All ER 610, Milmo J reached the remarkable conclusion that

> 'a police officer driving a motor car in hot pursuit of a person or persons whom he rightly suspects of having committed an arrestable offence does not owe that person the same duty of care which he owes to a lawful and innocent user of the highway going about his lawful occasions' (at 614 e).

The end to be achieved by the activity, its social utility, has for long been recognised as a relevant circumstance when deciding whether the defendant has discharged the objective standard of care of the reasonable person (eg the war-time ambulance driver in *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333). But this has to be weighed against the risks involved (eg the fire-engine driver held liable for disregarding a stop light in *Ward v London County Council* [1938] 2 All ER 341). The distinction which Milmo J sought to draw between 'innocent citizens' and 'criminals whom they are endeavouring to arrest' begs a great many questions, for example as to when a suspect becomes a 'criminal' deprived of the protection of the law of negligence. It is not supported by *Ashton v Turner* [1980] 3 All ER 870, [1981] QB 137, which concerns the duty owed by one participant in crime to another. Milmo J was, of course, right to say that the police officer should not be judged in the same way as if he had time to consider all possible alternative courses of action. The exigencies of a situation, of emergency are clearly relevant. But this is not a justification for conferring some kind of immunity from negligence upon police officers. (Another 'immunity' was called into question by Lord Denning MR in *Kelly v London Transport Executive* [1982] 2 All ER 842 at 851 g, when, obiter, he suggested that counsel who represents a legally-aided client and who fails in the duty he owes to the other side cannot claim immunity from suit on the ground that the work was done in the course of litigation, since that immunity only applies in relation to work for his own client. *Sed quaere?*)

Postscript The Court of Appeal has disapproved Milmo J's statement of the law, although dismissing the appeal against his decision on the ground that the police officer had not been negligent in all the circumstances: (1983) Times, 16 March.

Remoteness of damage—novus actus interveniens

Knightley v Johns [1982] 1 All ER 851, CA is notable for the careful review by Stephenson LJ (with whom Dunn LJ and Sir David Cairns agreed) of the authorities on the proper test to be applied in determining whether the chain of causation between a tort and subsequent damage has been broken by a

novus actus interveniens. J negligently overturned his car near the exit of a tunnel carrying one-way traffic thereby obscuring the exit and the site of the accident to drivers entering the tunnel. S, the police inspector in charge, negligently ordered K to ride on his motorcycle the wrong way along the tunnel to close the other end. In doing so he collided with a car being driven by C who was not negligent. K was not negligent. The Court of Appeal held that S's negligence in not closing the tunnel and in ordering K to do so by a dangerous manoeuvre had been the real cause of K's injuries. It was a new cause interrupting the sequence of events between J's negligence and K's accident. Accordingly S (and his chief constable) were liable to K, and J was not.

Stephenson LJ reached this conclusion by reasserting the reasonable foresight test, and taking the view that Lord Reid's consideration of degrees of foreseeability and possibility in *Home Office v Dorest Yacht Co Ltd* [1970] 2 All ER 294 at 300, [1970] AC 1004 at 1030, did not depart from this test, except perhaps his insistence on human actions being less easily foreseeable than a sequence of natural 'inanimate' reactions. Stephenson LJ provides some helpful guidelines for judging whether a sequence of events is a natural and probable result of the original negligent act (at 865 g). In particular,

> 'negligent conduct is more likely to break the chain of causation than conduct which is not; positive acts will more easily constitute new causes than inaction. Mistakes and mischances are to be expected when human beings, however well trained, have to cope with a crisis'.

Occupiers' liability

Is a person making use of a private right of way for the purpose of obtaining access to the dominant tenement a lawful visitor of the occupier of the servient tenement? In *Holden v White* [1982] 2 All ER 328, the Court of Appeal answered this question in the negative. A milkman was injured when he stepped on a defective manhole cover in a pathway while delivering milk to a house. The house was owned by a third party and had 'a right of way at all times and for all purposes' over and along the pathway. The defendant was the owner of the land over which the pathway giving access to the house was laid. It was assumed (although not without doubt, see at 331 d, 334 f) that this ownership was equivalent to occupation, and the Court of Appeal confined itself to the question whether a person crossing land in pursuance of a private right of way was an invitee or licensee of that occupier at common law, and hence a lawful visitor under s 1(2) of the Occupier's Liability Act 1937. The court followed *Greenhalgh v British Railways Board* [1969] 2 All ER 114 at 117, [1969] 2 QB 286 at 292, and held that s 2(6), which treats as visitors those entering 'in the exercise of a right conferred by law', does not cover entrants by virtue of a public or private right of way. The owner of the servient tenement never issued an invitation or granted permission to the milkman to be at the place where he was injured. He was there solely by virtue of an easement. As Ormrod LJ (at 334 b) said

> 'it would be quite illogical, therefore, to impose on the servient owner any obligation other than not to obstruct, ie diminish, the right of way'.

It was not necessary for the court to decide whether the milkman could establish a claim against the owner of the dominant tenement, but Oliver LJ (at 333 d–e) indicated that if that owner had a sufficient degree of control over the manhole cover set in the path for the benefit of, and presumably maintained by, him he could be an occupier for purposes of the 1957 Act.

For further comment, see K M Stanton, (1982) 98 LQR 541.

Strict liability

Animals

In *Wallace v Newton* [1982] 2 All ER 106 a horse, inappropriately named Lord Justice, was known by its keeper to have a nervous and unpredictable temperament. One day, while being loaded onto a horse box trailer, it became violent and uncontrollable and leaped forward crushing the groom's arm against a breast bar. Under s 2(2)(b) of the Animals Act 1971 the groom had to establish that the likelihood of damage was due to characteristics of Lord Justice not normally found in horses. Park J held that this did not mean that it was necessary to show that Lord Justice had a vicious or dangerous tendency, but simply that her injuries were due to a characteristic unusual in a horse. This was satisfied by the evidence that Lord Justice was unpredictable and unreliable in his behaviour.

Economic torts

Deliberate interference with trade—statutory torts

RCA Corp v Pollard [1982] 3 All ER 771, CA (reversing the decision of Vinelott J [1982] 2 All ER 468) decides that recording companies have no civil remedies against bootleggers. These are persons who make and market unauthorised recordings of live performances by artists (in this case, Elvis Presley) who are under exclusive recording contracts to the companies. This is a criminal offence under s 1 of the Dramatic and Musical Performers' Protection Act 1958 as amended. It also causes serious economic loss to the recording companies. Not surprisingly Lawton LJ (at 778 h) described the result as 'unpleasing'. Slade LJ (at 785 h) said that those who think 'this situation constitutes an undesirable gap in the law' will have to look to the House of Lords or Parliament to fill it.

It is a result which was reached by considering, and rejecting, three interlinked avenues along which the declarations and injunctions sought might have been granted. The first was the action for breach of statutory duty. This avenue was blocked by the decision of Waller and Shaw LJJ in *Ex p Island Records Ltd* [1978] 3 All ER 824, [1978] Ch 122, that the 1958 Act was a penal statute which, as a matter of construction, did not provide a civil remedy for performers and record companies. Lord Denning MR, in that case (at 829 b), had declined to indulge in the 'game of chance' as to the dividing line between those penal statutes which create civil liability and those which do not. In *RCA v Pollard*, the Court of Appeal had to decide whether the restatement of the principles of construction by the House of Lords in *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456, [1982] AC 173 had made any difference, since Lord Diplock (at 462) had specifically remarked that the 1958 Act

> 'was passed for the protection of a particular class of individuals, dramatic and musical performers; even the short title says so'.

In *Warner Bros Records Inc v Parr* [1982] 2 All ER 455, Julian Jeffs QC (sitting as a deputy High Court judge) held that, notwithstanding Lord Diplock's remarks, he was bound by the *Island Records* case. In *RCA v Pollard*, on the other hand, Vinelott J [1982] 2 All ER at 475, thought that, as regards performers, *Island Records* had been overruled by the *Lonrho* case. In the Court of Appeal, only Oliver LJ (at 799j–780c) referred to the position of performers. He considered that Lord Diplock had not been referring to the principle that there is a civil remedy where the obligation is imposed for the benefit of a particular class of individuals, but rather to the situation where a statute creates a public right and a particular member of the public who suffers special damage is entitled to enforce the public duty. The implication is that a performer may obtain an injunction (as in *Ekland v Scripglow Ltd* [1982] FSR 432) but has no action for damages. Lord Diplock had left open the position of the recording companies. In *RCA v Pollard*, Vinelott J and all three judges in the Court of Appeal decided that *Island Records* was still binding upon them. The 1958 Act was not passed for the benefit of the recording companies. They had no civil right of action, either in respect of a statutory tort, or for the enforcement of a public duty.

A second avenue was through the innominate tort of deliberate interference with the trade or business of another by unlawful means, or, even in the absence of a tort, the equitable remedy of an injunction to protect property rights against crime. There was support for the former in Lord Denning MR's judgment, and for the latter in Waller LJ's judgment, in *Island Records*. However, in *Lonrho*, Lord Diplock had regarded as incorrect any

> 'general rule . . . that whenever a lawful business carried on by an individual in fact suffers damage as the consequence of a contravention by another individual of any statutory prohibition the former has a civil right of action against the latter for such damage' ([1981] 2 All ER at 463b).

This had not deterred the judges at first instance in both *Warner Bros Records Inc v Parr* and *RCA Corp v Pollard* from deciding in favour of the recording companies on the grounds of unlawful interference with their property rights in the economic advantages to be obtained from their recording contracts. But the Court of Appeal in *RCA Corp v Pollard* decided unanimously that the effect of Lord Diplock's remarks was to overrule both Lord Denning MR's general rule and Waller LJ's more limited principle in *Island Records* (per Lawton LJ at 778d, Oliver LJ at 782h, Slade LJ at 785).

Where does this leave the tort of deliberate interference with trade or business by unlawful means? One point to notice is the concern of Oliver LJ to demonstrate that this innominate tort does not confer a cause of action

> 'where the damage complained of is merely economic damage as an incidental result of the breach of prohibition in a statute not designed to protect the interests of a class to which the plaintiff belongs' (at 781j).

This is symptomatic of the confusion, implicit in the *Lonrho* case, between deliberate and foreseeable damage and between the innominate tort and the grounds in equity for the grant of injunctions to protect property rights. It fails to take account of cases such as *Gouriet v Union of Post Office Workers*

[1977] 3 All ER 70, [1978] AC 435, in which it was assumed that a plaintiff whose private rights are infringed may obtain an injunction against *foreseeable* damage, although no tort has been committed. So far as the innominate tort is concerned the rejection in *Lonrho* of the principle in *Beaudesert Shire Council v Smith* (1966) 120 CLR 145, Aust HC, that an action lies for harm or loss which is the inevitable consequence of the unlawful and intentional act of another, might be thought to have underlined the requirement of *deliberate* interference. However, this requirement may now have to be reconsidered in the light of the decision of the House of Lords in the *Junior Books* case (discussed above). To adapt Oliver LJ's example in *Pollard* ([1982] 3 All ER at 782) is it not reasonably foreseeable to a burglar that the well-publicised robbing of homes in Chelsea will depreciate the value of properties in the area? More directly, is there not now a duty of reasonable care not to commit acts of bootlegging which the defendant actually knows will render less valuable the recording companies' contractual rights with their performers?

Another point is that the Court of Appeal seems to have placed a quite unnecessarily wide interpretation upon *Lonrho*, although it has to be said that the speech of Lord Diplock in that case is brief to the point of obscurity and was delivered without a full consideration of the authorities on economic loss, and even without calling upon the respondents. It would have been possible to construe the basis of the decision as being that only an independently actionable breach of a penal statute constitutes unlawful means for purposes of the innominate tort. This would mean that the plaintiffs had no right to damages, but could still obtain injunctive relief to protect their property from criminal acts. Unfortunately, the Court of Appeal placed a much wider interpretation upon *Lonrho*.

A third avenue was to claim that the bootlegger had committed the tort of interference with contractual relations. Vinelott J in *Pollard* [1982] 2 All ER at 478, thought it was 'at least strongly arguable' that a bootlegger who *made* the recording committed a direct interference with contractual rights. (There was no such allegation in this case.) But this was rejected by Slade LJ (at 784 f–h) on the ground that the tort requires an interference with the *performance* by a third party of his contractual obligations. It does not apply where

> 'A does an act (even an illegal act) which he knows is likely to render less valuable certain contractual rights of B as against C, without actually interfering with the performance by C of the contractual relations owed by him to B' (at 784 f; and cf Oliver LJ at 782 c).

For further comment see W[edderburn] (1983) 46 MLR 224, A Evans [1983] 2 EIPR 31.

Property torts

Trover

On 15 November 1978 Mr Alan Parker while, apparently, an outgoing passenger in the international executive lounge at Terminal 1, Heathrow Airport, found a gold bracelet lying on the floor. He very properly handed the bracelet to an employee of British Airways, gave his name and address and asked for the bracelet to be returned to him if it was not claimed by the

owner. The owner never claimed the bracelet, but instead of returning it to Mr Parker, British Airways sold it and kept the proceeds. Mr Parker sued the Airways, and the Court of Appeal upheld the decision of Brentford county court that he was entitled by an action of trover to £850 damages and interest: *Parker v British Airways Board* [1982] 1 All ER 834, CA.

Donaldson LJ remarked (at 836 b) that it was 'astonishing' that there should have been any doubt as to who was right. But Mr Parker will earn legal immortality because he gave the Court of Appeal an opportunity to clear up the considerable uncertainty and conflicting decisions concerning the rights and obligations of the finder of chattels, and those of the occupier on whose land they are found. These principles are admirably summarised by Donaldson LJ (at 843 b–h) and need not be repeated in full here. The 'finders keepers' rule does not apply if the chattel was neither lost nor abandoned, or if the finder did not take it into his care and control. He acquires 'very limited rights' (the exact limits are still to be defined) if he takes it with dishonest intent or in the course of trespassing. A servant or agent finding a chattel in the course of his employment does so on behalf of his employer. In other circumstances the finder's claim may be defeated by the true owner or

> 'one who can assert a prior right to keep the chattel which was subsisting at the time when the finder took the chattel into his care and control'.

In this respect an occupier of land or buildings has rights superior to those of a finder of chattels attached to the land or buildings. If not attached, then the occupier has superior rights only if

> 'before the chattel is found, he has manifested an intention to exercise control over the building and the things which may be in or on it'.

Both finder and occupier are under an obligation to take reasonable measures to acquaint the true owner of the finding.

The critical issue in cases of 'picking up', as distinct from 'digging up', is now likely to be whether on the facts the occupier has shown an intention to exercise control before the chattel was found. Between the extremes of the vaults of a bank, where control is obvious, and a park to which the public has unrestricted access, will be an infinite variety of premises such as the forecourts of petrol filling stations, unfenced front gardens of private houses, and the public parts of shops. In the absence of evidence of regular searches for lost articles, it may be difficult for the occupiers of such premises to prove that they exercised a sufficient degree of control over lost property before it was found.

For further comment, see S Roberts (1982) 45 MLR 683.

Defamation

Injunctions

In *Harakas v Baltic Mercantile and Shipping Exchange Ltd* [1982] 2 All ER 701, the Court of Appeal applied the well-established principle that where there is a defence of justification or qualified privilege in respect of a libel, an injunction restraining further publication will not be granted unless it can be shown that the defendant dishonestly and maliciously proposes to say or publish information he knows to be untrue.

Loss distribution

Contribution between tortfeasors

Ronex Properties Ltd v John Laing Construction Ltd and others (Clarke, Nicholls & Marcel (a firm) third parties) [1982] 3 All ER 961, CA, decides that a cause of action for contribution under the Law Reform (Married Women and Tortfeasors) Act 1935 is not extinguished on the claimant's death. It would appear that *a fortiori* the same conclusion would be reached under the Civil Liability (Contribution) Act 1978 (which came into force after the present cause of action arose). The starting point of the submission that the principle *actio personalis moritur cum persona* applied was that a cause of action for contribution under the 1935 Act arose at the earliest when the claimant tortfeasor had been held liable or admitted liability to the plaintiff. The 1978 Act, s 1(6), expressly removes that limitation and so the argument would fail *in limine*.

Trusts

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1982 has been a quiet year in the development of trusts. Interesting questions have arisen, in land law, with respect to resulting trusts (*Bernard v Josephs* [1982] 3 All ER 162) and to constructive trusts (*Lyus v Prowsa Developments Ltd* [1982] 2 All ER 953). These are dealt with at pp 169 and 165 above.

For some time it has been realised that gifts to unincorporated associations and the destination of surplus property on the dissolution of such associations raise important questions as to the respective roles of trust and contract. A prior question, however, is whether—and when—an unincorporated association, as distinct from a more or less amorphous group, exists. Some useful criteria for the existence of an unincorporated association were discussed by Vinelott J in *Conservative and Unionist Central Office v Burrell* [1980] 3 All ER 42 at 58; these were not expressly affirmed by the Court of Appeal, ([1982] 2 All ER 1) but the definition adopted by Lawton LJ at [1982] 2 All ER at 4 b–c clearly owes much to them, but may be slightly more lax. The Court of Appeal upheld Vinelott J's rejection of the finding of the Special Commissioners that the funds of the Conservative Central Office were held on behalf of the members of an unincorporated association; it did not follow, however, that a member who had paid a subscription and who considered that his subscription had been or might be misapplied was without a remedy: the treasurer or other officer of the organisation was an agent and was therefore liable for misapplication unless, on 'ordinary accounting principles' (*quaere* the rule in *Clayton's Case* (1816) 1 Mer 572) the plaintiff's contribution had been spent before the alleged misappropriation. A problem arises, as Brightman LJ (with whom, on this point, Lawton and Fox LJJ concurred) admitted. How could a bequest be made to the Central Office of the Conservative Party? There could, after all, at the moment of death be no agency established between the testator and the treasurer or other officer of the party, the testator's chosen agent. Brightman LJ thought that an answer would not be difficult to find, but did not provide it. This is not the first time that a judge has stated that problems arise in making gifts by will to an unincorporated association that do not arise where the gift is made *inter vivos*: see *Re Grant's Will Trusts* [1979] 3 All ER 359 at 371–2, per Vinelott J citing *Re Recher's Will Trusts* [1971] 3 All ER 401 at 405, per Brightman J. Until English law comes fully to terms with the concept of an unincorporated association and the problems caused thereby, and delineates clearly the roles of the relevant legal concepts, such difficulties may be expected.

If *Conservative and Unionist Central Office v Burrell* is relevant in determining whether and when an unincorporated association has arisen, *Re GKN Bolt and Nuts Ltd's Sports and Social Club* [1982] 2 All ER 855 casts light on when such an association ceases to exist and on the basis for distribution of any surplus funds. Sir Robert Megarry V-C emphasised that in what he called 'the club cases', the courts should give weight to general concepts of

reasonableness, fairness and common sense, against claims based on a more strict and literal approach. As Sir Robert Megarry remarked 'allowance must be made for some play in the joints' ([1982] 2 All ER at 857 f). The cynic might remark that the chequered history of cases on the dissolution of unincorporated associations displays all play and very few joints, and that even where joints exist, they are uncertain both in concept and ambit. However, recent decisions such as *Re St Andrew's Allotment Association's Trusts* [1969] 1 All ER 147, *Re Sick and Funeral Society of St John's Sunday School, Golcar* [1972] 2 All ER 439 and *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No. 2)* [1979] 1 All ER 623, indicate that the destination of surplus funds is governed by contract rather than by trust, and on the basis of equality rather than proportion (see CEF Rickett [1980] CLJ 88, and Brian Green (1980) 43 MLR 626). The first question, however, was to determine whether the club had been dissolved. It was alleged that a resolution had been adopted by the members to wind up the club, and Sir Robert Megarry regarded that resolution as valid ([1982] 2 All ER at 861 g–h). However, he went on to consider the question whether there had been a 'spontaneous dissolution'. A similar problem had arisen in *Re William Denby and Sons Ltd's Sick and Benevolent Fund* [1971] 2 All ER 1196, where Brightman J had found that an unregistered friendly society could be regarded as having ended once its 'substratum' had gone; Sir Robert Megarry accepted the result, but was somewhat unhappy about the use of the phrase 'substratum has gone', because of overtones of the Companies Act (cf, however, the judgment of Megarry J on the Variation of Trusts Act 1958 s 1(1) in *Re Ball's Settlement* [1968] 2 All ER 438 at 442 i). Sir Robert Megarry accepted that mere inactivity was not enough to justify a finding that there was a spontaneous dissolution; there had to be 'other circumstances'; the stronger these other circumstances, the shorter the period of dormancy need be, and the weaker the circumstances, the longer the period. On the facts (summarised briefly in [1982] 2 All ER 861 h–j) there was evidence that a spontaneous dissolution had occurred. It seems essential, given the somewhat informal nature of many clubs, that such a concept should exist. Although it may be difficult to point out a date at which a club comes to an end, it is usually possible to point to a date by which it is clear that the club has come to an end. The alleged requirement that there must be a point at which an unincorporated association comes into existence (see *Conservative and Unionist Central Office v Burrell* [1980] 3 All ER at 58 a) may in fact be little more than a requirement that it should be clear when the association in question has assumed its present form ([1982] 3 All ER at 58 d–e); in any event, an analogous requirement should not apply to the cessation of an unincorporated association.

Given that the club had been dissolved, it was necessary to decide who were to be the recipients of the club's property, and in what shares. The members at the date of the dissolution were the obvious beneficiaries, and, following cases such as *Re Sick and Funeral Society*, each member should receive an equal share, irrespective of the length of his membership and of any benefits he had received. As *Re Sick and Funeral Society* shows, however, different classes of members may be treated differently.

In *Re GKN* there were full members, honorary members, associates, temporary members and spouses and children—all of whom were entitled to

benefit from the activities of the club. Only full members had voting rights and had paid subscriptions; the others had rights to use the club, but without the powers and responsibilities of full members. Bearing these factors in mind, Sir Robert Megarry held that only full members benefited. This seems in accord with common sense, with the terms of the membership contracts, and with the flexibility expounded in *Re Sick and Funeral Society*.

The question of a trust being created or arising was discussed by the House of Lords in *Swain v Law Society* [1982] 2 All ER 827 (A M Kenny [1982] Conv 449). The case is obviously of great importance to solicitors, and a full account of the case will be found in the article on Solicitors (see p 262 above). The courts below ([1980] 3 All ER 615 (Slade J) and [1981] 3 All ER 797 (CA)) found that the Law Society was trustee for solicitors in respect of which it had taken out a master insurance policy to cover professional liability. The Court of Appeal found that the words 'on behalf of' and the nature of the scheme gave rise to a trust and further held (contrary to what Slade J had decided) that the Law Society was accountable to the solicitors for the brokerage commission it had received. These arguments were given short shrift by the House of Lords, but there is some difficulty in deciding what is the ratio of their Lordships' speeches. The words 'on behalf of' did not, according to Lord Brightman, *express* a trust, nor did they necessarily *imply* a trust (his Lordship's italics) ([1982] 2 All ER at 840 c). But the reasoning is a little surprising. First, Lord Brightman states that there 'are numerous authorities to this effect, to which it is unnecessary to refer' ([1982] 2 All ER at 840 c). Although cases such as *Lambe v Eames* (1871) LR 6 Ch App 597 and *Re Adams and The Kensington Vestry* (1884) 27 Ch D 394 were not mentioned, it is to these and others that his Lordship was presumably referring. However, other cases, more recently decided, adopt a less rigorous approach: see *Re Kayford* [1975] 1 All ER 604 and *Paul v Constance* [1977] 1 All ER 395. In the former case, Megarry J asserted ([1975] 1 All ER at 607 b),

> 'it is well settled that a trust can be created without using the word "trust" or "confidence" or the like: the question is whether in substance a sufficient interest to create a trust has been manifested.'

The writer has a preference for the more restricted view manifested in the older cases, and seemingly re-asserted in *Swain*, that one cannot, unlike M Jourdain speaking prose, create a trust without realising what one is doing—or at any rate without using words that to the reasonable man, or the court, are proper words for the creation of a trust.

The second strand of reasoning is that it would be surprising if a society of lawyers should fail to make their intention clear if it were their intention to create a trust. This, with respect, may be placing too much importance on the status of the alleged creators of the obligation. Normally the courts consider what parties say rather than what they have meant, and (without prejudice to any argument based on implied or constructive trusts) the supposed skill or knowledge of the creator, or, if known, his draftsman, should not be relevant. Lord Brightman further held that there was no need to imply a trust to give effect to the interests of the solicitors insured under the policy, and held, further, that in the absence of any evidence of unconscionable behaviour by the Law Society, there was no constructive trusteeship on the Law Society's part. This assumes, it seems, that the aim of the constructive

trust is to provide a remedy against unconscionable conduct or fraud (and see the commentary on *Lyus v Prowsa Developments Ltd* [1982] 2 All ER 953, pp 165 et seq above). The Court of Appeal, however, had found a fiduciary relationship and relied upon the well-established rule in *Keech v Sandford* (1726) Sel Cas Ch 61 that a trustee must not place himself in a position where his duty and interest might conflict.

Lord Diplock adopted a rather different view, which seemed to be based on contract rather than on trust, but, as Kenny ([1982] Conv 447) points out, this does not dispose of the point that the mutual contracts flowed from the agreement entered into under the master policy, and that the commission also flowed from the agreement. Certainly there is no rule that contract and trust are exclusive: see *Barclays Bank Ltd v Quistclose Investments Ltd* [1968] 3 All ER 651; similarly, a contract can be protected by a constuctive trust: see *Binions v Evans* [1972] 2 All ER 70, *Lyus v Prowsa Developments Ltd* [1982] 2 All ER 953, but cf *Re Sharpe (a bankrupt)* [1980] 1 All ER 198.

A final point is that the House of Lords' rejection of the trust approach rests partly on an alleged dichotomy between public law and private law, or between public duties and private rights. Whether this dichotomy does or should exist is unclear, and dicta in *Tito v Waddell (No 2)* [1977] 3 All ER 129 at 230–1 and 235 support the view that private fiduciary duties and public obligations may co-exist.

International Sales and Agencies Ltd v Marcus [1982] 3 All ER 551 contains a clear and concise analysis by Lawson J of some of the problems of constructive trusts. Lawson J emphasised that there were two categories of constructive trustees: those who receive moneys held by a constructive trustee and receive these for their own benefit; second, those who act as a channel through which funds disposed of in breach of constructive trust reach other quarters ([1982] 2 All ER at 557); this represents a useful clarification of some of the authorities. The remedy sought (which Lawson J granted) was by way of money had and received at common law, or by way of restitution in equity, the two remedies not being distinguished.

Finally, the phrase 'any person interested in the charity' in the Charities Act 1960 s 28(1) was considered, on motion, by Sir Robert Megarry V-C in *Haslemere Estates v Baker* [1982] 3 All ER 525. (The case also raises points of land law, see pp 173 above). The learned judge did not define the term fully, but distinguished between a person interested in the charity, such as a beneficiary, from a person interested in the property of a charity, such as certain tenants, or the holders of land obligations, or a person in a contractual relationship with the charity in respect of the charity's property); the latter had claims adverse to the charity rather than in respect of it. Whether this is too restrictive a view may be questioned. Clearly, officious strangers should not be allowed to interfere in the affairs of a charity, but in view of the broader view of locus standi adopted in administrative law, the restriction may be queried. Sir Robert Megarry himself implicitly admits this, by stating that not every tenant of charity lands is not a 'person interested'. It is easy to contemplate situations where a tenant of a substantial part of a charity's land may well be interested—in the lay sense—in the affairs of a charity, and it would seem arbitrary to deny him any remedy under the Charities Act 1960 s 28.

A brief reference should be made to *Roche v Sherrington* [1982] 2 All ER 426.

It may be noted that the court considered that presumed undue influence (actual undue influence was not argued) sufficient to upset a transaction might exist between a member of an unincorporated association and the association. The action, however, was stayed on other grounds.